No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
STRATTON C. STRAND
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 3
Reasons for granting the petition 12
A. The court of appeals erred in holding substantial portions of 18 U.S.C. 3583(k) to be unconstitutional and unenforceable 13
1. The district court's enforcement of the conditions of respondent's supervised release under Section 3583(k) did not require a jury finding beyond a reasonable doubt 13
2. The application of Section 3583(k) did not unconstitutionally punish respondent for new criminal conduct 23
3. Section 3583(k) can be enforced even if the jury trial and related due process rights apply 25
B. The question presented warrants this Court's review 27
Conclusion 32
Appendix A — Court of appeals opinion (Aug. 31, 2017) 1a
Appendix B — District court opinion and order (Aug. 2, 2016) 35a
Appendix C — Court of appeals order (Jan. 16, 2018) 70a
Appendix D — Statutory provisions 71a

TABLE OF AUTHORITIES

Cases:

Alleyne v. *United States*, 570 U.S. 99 (2013) 9, 14, 16, 22
Anderson v. *Corall*, 263 U.S. 193 (1923) 18

Cases—Continued: Page

Apprendi v. *New Jersey*, 530 U.S. 466 (2000)..... 9, 13, 14, 15
Blodgett v. *Holden*, 275 U.S. 142 (1927)..... 27
Department of Transp. v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015)..... 27
Dillon v. *United States*, 560 U.S. 817 (2010)..... 21
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973)..... 11, 19
Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010)..... 27
Johnson v. *United States*, 529 U.S. 694 (2000)..... *passim*
Jones v. *United States*, 526 U.S. 227 (1999)..... 26
Matal v. *Tam*, 137 S. Ct. 1744 (2017)..... 27
Minnesota v. *Murphy*, 465 U.S. 420 (1984)..... 19
Morrissey v. *Brewer*, 408 U.S. 471 (1972)..... 9, 17, 18, 19, 20
Oregon v. *Ice*, 555 U.S. 160 (2009)..... 14, 15, 17
Rostker v. *Goldberg*, 453 U.S. 57 (1981)..... 27
Samson v. *California*, 547 U.S. 843 (2006)..... 18, 19
Smith v. *Doe*, 538 U.S. 84 (2003)..... 28
Southern Union Co. v. *United States*, 567 U.S. 343 (2012)..... 14, 17, 25, 26
United States v. *Alvarez*, 567 U.S. 709 (2012)..... 27
United States v. *Beyers*, 854 F.3d 1041 (8th Cir. 2017), cert. denied, 138 S. Ct. 562 (2017)..... 29
United States v. *Booker*, 543 U.S. 220 (2005)..... 9, 14, 20, 25
United States v. *Carlton*, 442 F.3d 802 (2d Cir. 2006)..... 30
United States v. *Comstock*, 560 U.S. 126 (2010)..... 27, 28
United States v. *Cordova*, 461 F.3d 1184 (10th Cir. 2006)..... 30
United States v. *Cunningham*, 607 F.3d 1264 (11th Cir.), cert. denied, 562 U.S. 971 (2010)..... 30
United States v. *Dees*, 467 F.3d 847 (3d Cir. 2006), cert. denied, 552 U.S. 830 (2007)..... 30

Cases—Continued: Page

United States v. *Gavilanes-Ocaranza*, 772 F.3d 624 (9th Cir. 2014), cert. denied, 136 S. Ct. 225 (2015) 30
United States v. *Helton*, 782 F.3d 148 (4th Cir. 2015) 29
United States v. *Henry*, 852 F.3d 1204 (10th Cir. 2017) 30
United States v. *Hinson*, 429 F.3d 114 (5th Cir. 2005), cert. denied, 547 U.S. 1083 (2006) 30
United States v. *House*, 501 F.3d 928 (8th Cir. 2007) 30
United States v. *James*, 792 F.3d 962 (8th Cir. 2015) 29
United States v. *Johnson*, 356 Fed. Appx. 785 (6th Cir. 2009) 30
United States v. *Kebodeaux*, 570 U.S. 387 (2013) 17, 27, 28
United States v. *Knights*, 534 U.S. 112 (2001) 19
United States v. *McIntosh*, 630 F.3d 699 (7th Cir.), cert. denied, 563 U.S. 951 (2011) 30
United States v. *Nesler*, 659 Fed. Appx. 251 (6th Cir. 2016) 26
United States v. *O'Brien*, 560 U.S. 218 (2010) 30
United States v. *Owen*, 854 F.3d 536 (8th Cir. 2017) 30
United States v. *Ray*, 530 F.3d 666 (8th Cir. 2008) 30
United States v. *Sperling*, 699 Fed. Appx. 636 (9th Cir. 2017), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018) 32
United States v. *Stevens*, 559 U.S. 460 (2010) 27
United States v. *Terry*, 690 Fed. Appx. 358 (6th Cir. 2017) 29
United States v. *Trailer*, 827 F.3d 933 (11th Cir. 2016) 29
United States v. *Ward*, 770 F.3d 1090 (4th Cir. 2014) 30, 31
United States v. *Williams*, 553 U.S. 285 (2008) 27, 28

Cases—Continued: Page

United States v. *Work*, 409 F.3d 484 (1st Cir. 2005) 30
Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 27

Constitution, statutes, guidelines, and rule:

U.S. Const.:
Amend. IV 19
Amend. V 2, 12, 13, 14, 27
Due Process Clause 19
Amend. VI ..... *passim*
Confrontation Clause 30
Jury Trial Clause 29
Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587:
§ 102, 120 Stat. 590 28
§ 141(e)(2), 120 Stat. 603 28
Parole Act, ch. 387, 36 Stat. 819 18
§ 1, 36 Stat. 819 18
§ 3, 36 Stat. 819 18
§ 4, 36 Stat. 820 18
§ 6, 36 Stat. 820 18
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987 19
Sex Offender Registration and Notification Act, 34 U.S.C. 20901 *et seq.* (formerly codified at 42 U.S.C. 16901 *et seq.*) 5
18 U.S.C. 7
18 U.S.C. 2252 16
18 U.S.C. 2252(a)(4)(B) 3, 4, 7
18 U.S.C. 2252(b)(2) 3, 4, 10
18 U.S.C. 3582(c)(2) 21
18 U.S.C. 3583 (2012 & Supp. IV 2016) 2, 71a

Statutes, guidelines, and rule—Continued: Page

18 U.S.C. 3583(a) 4, 71a
18 U.S.C. 3583(d) (2012 & Supp. IV 2016) 4, 5, 72a
18 U.S.C. 3583(e)(3) ..... *passim*, 75a
18 U.S.C. 3583(g) (1988) 31
18 U.S.C. 3583(h) 8, 77a
18 U.S.C. 3583(k) (Supp. IV 2016) ..... *passim*, 78a
United States Sentencing Guidelines:
Ch. 7:
Pt. A, intro 3(b) 12
§ 7B1.1 25
Fed. R. Crim. P. 32.1(b) 26

Miscellaneous:

Administrative Office of the U.S. Courts, *Judicial Business 2017 Tables: Federal Probation System*, http://www.uscourts.gov/statistics-reports/judicial-business-2017-tables (last updated Sept. 30, 2017) 28, 29
4 U.S. Dep't of Justice, *Attorney General's Survey of Release Procedures: Parole* (1939) 17, 18

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 869 F.3d 1153. A prior opinion of the court of appeals is reported at 672 F.3d 948. The opinion of the district court (App., *infra*, 35a-69a) is not published in the Federal Supplement but is available at 2016 WL 4094886.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2017. A petition for rehearing was denied on January 16, 2018 (App., *infra*, 70a). On April 4, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 16,

2018. On May 3, 2018, Justice Sotomayor further extended the time to and including June 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Section 3583(k) of Title 18 provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. 3583(k) (Supp. IV 2016).*

Other pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 71a-78a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, respondent was convicted on one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). App., *infra*, 2a. The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923. The district court subsequently revoked respondent's supervised release and ordered five years of reimprisonment, to be followed by five years of supervised release. App., *infra*, 35a-69a. The court of appeals affirmed the revocation of supervised release but vacated the order of reimprisonment and remanded. *Id.* at 1a-28a.

1. In 2007, an undercover federal agent "caught [respondent] sharing child pornography files on * * * a peer-to-peer sharing network." App., *infra*, 37a. Agents subsequently "located seventy files containing child pornography" on respondent's computer. *Ibid.* Respondent admitted that he was "addicted to child pornography" and that he regularly downloaded and viewed pornographic images of children. *Ibid.*

A grand jury indicted respondent for possession and attempted possession of child pornography, in violation

---

* Unless otherwise indicated, all references to 18 U.S.C. 3583 are to the 2012 edition of the United States Code, with amendments contained in the 2016 Supplement IV. The current version of the statute is identical in all material respects to the version of the statute in force at the time of respondent's sentencing.

of 18 U.S.C. 2252(a)(4)(B) and (b)(2). See 672 F.3d at 951. Respondent proceeded to trial, and a jury found him guilty based on his possession of seven images of child pornography. *Id.* at 953, 960.

2. The jury's finding of guilt exposed respondent to a sentence containing multiple component parts. Under 18 U.S.C. 2252(b)(2), respondent could "be fined * * * or imprisoned not more than 10 years, or both." In addition, 18 U.S.C. 3583(a) provides that the "court, in imposing a sentence to a term of imprisonment * * * may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment," and must do so "if such a term is required by statute." Under the first sentence of 18 U.S.C. 3583(k), "the authorized term of supervised release" for respondent's child-pornography offense—and for various other sex offenses and crimes against minors—"is any term of years not less than 5, or life."

Supervised release is "a form of postconfinement monitoring overseen by the sentencing court." *Johnson* v. *United States*, 529 U.S. 694, 697 (2000). Similar in many ways to parole (which it replaced in the federal system, see *id.* at 710-711), supervised release provides a conditional form of liberty to assist former prisoners "in their transition to community life," *id.* at 709 (citation omitted). "While on supervised release, the offender [is] required to abide by certain conditions, some specified by statute and some imposable at the court's discretion." *Id.* at 697; see 18 U.S.C. 3583(d). For example, every sentence including a term of supervised release must order, "as an explicit condition," that "the defendant not commit another Federal, State, or local crime during the term of supervision." 18 U.S.C. 3583(d).

A defendant's ability to remain out of prison during his term of supervised release is contingent upon his compliance with the conditions of that release. See *Johnson*, 529 U.S. at 709 (noting the possibility that a defendant "trie[s] liberty and fail[s]"). If the sentencing court, in overseeing a defendant's term of supervised release, "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," the court may "revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3).

In *Johnson* v. *United States*, *supra*, this Court considered the nature of "postrevocation penalties" such as reimprisonment under 18 U.S.C. 3583(e)(3) after a violation of supervised-release conditions, or reimprisonment after a violation of parole conditions, and "attribute[d]" those penalties "to the original conviction." *Johnson*, 529 U.S. at 701. The Court explained that even though the "acts of violation" may be "criminal in their own right," a court's reliance upon them for supervised-release revocation and reimprisonment is "part of the penalty for the initial offense." *Id.* at 700.

3. The district court in this case sentenced respondent to 38 months of imprisonment, to be followed by ten years of supervised release, subject to "numerous conditions." App., *infra*, 37a. In addition to statutorily required conditions that respondent "not commit another Federal, State, or local crime during the term of supervision," 18 U.S.C. 3583(d), and register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 *et seq.* (formerly codified

at 42 U.S.C. 16901 *et seq.*), the court required respondent to participate in sex-offender treatment, disclose all Internet devices and passwords, install and pay for software allowing monitoring of his computer activity, and refrain from viewing or possessing child pornography, 1 C.A. App. 31-32.

Respondent appealed his conviction, but did not challenge his sentence. The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923.

4. Following his discharge from prison, respondent failed to comply with numerous conditions of his supervised release, including registration as a sex offender, attendance at sex-offender treatment, and maintenance of monitoring software on his computer. App., *infra*, 38a. Respondent's probation officer "gave him a strict deadline for compliance" with the computer-monitoring condition, "which he did not meet." *Ibid.* Instead, respondent "bragged * * * that he could outsmart the monitoring software." *Ibid.* Probation officers then conducted a search of respondent's apartment, where they found computers that he had failed to report and a mobile phone that contained dozens of images of child pornography in its memory cache. *Id.* at 37a-45a.

After an evidentiary hearing, the district court found by a preponderance of the evidence that respondent had "committed five violations of his supervised release" by, *inter alia*, failing to comply with the computer monitoring condition, failing to participate in sex-offender treatment, and viewing child pornography. App., *infra*, 3a, 45a-46a. Of central relevance here, the court found by a preponderance of the evidence (but explicitly did not find beyond a reasonable doubt) that respondent, by knowingly possessing child pornography, had violated

his supervised-release conditions by engaging in conduct that would violate 18 U.S.C. 2252(a)(4)(B). App., *infra*, 3a, 45a-68a.

As previously discussed, the inherently conditional nature of supervised release incorporates the prospect of reimprisonment if the defendant proves unable to comply with the terms of that release. Under Section 3583(e)(3), any of respondent's violations could result in revocation of supervised release and reimprisonment for "all or part of the term of supervised release authorized by statute for the offense" of conviction. Revocation and reimprisonment under that provision would be subject to an "except[ion]," under which a defendant like respondent, whose supervised-release term stems from conviction of a class C felony, "may not be required to serve * * * more than 2 years in prison." 18 U.S.C. 3583(e)(3); App., *infra*, 14a.

Section 3583(k), which the district court applied when it imposed respondent's ten-year term of supervised release at sentencing, contains a more specific directive about the consequences of violating release conditions through certain specified conduct, including the knowing possession of child pornography. In particular, the second sentence of Section 3583(k) specifies the consequences when a defendant like respondent "required to register under [SORNA] commits any criminal offense under chapter * * * 110" of Title 18 punishable by longer than a year of imprisonment (which knowing possession of child pornography is). 18 U.S.C. 3583(k). In such a circumstance, "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein." *Ibid.* The third sentence of Section 3583(k)

provides that "[s]uch term shall be not less than 5 years." *Ibid.*

The district court accordingly applied Section 3583(k) to respondent's violation of the conditions of his supervised release by knowingly possessing child pornography. See App., *infra*, 4a. Finding "no factor present that warrant[ed]" reimprisonment beyond the required five years, 3 C.A. App. 152, the district court ordered respondent to return to prison for five years, to be followed by five years of supervised release, *id.* at 153; see 18 U.S.C. 3583(h) (allowing for a term of supervised release to follow reimprisonment). The court noted its "serious concerns about" the requirement that respondent return to prison for at least five years after a revocation decision made "without a jury," but did not address any constitutional questions. App., *infra*, 50a-51a.

5. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-28a. The court unanimously rejected respondent's challenge to the sufficiency of the evidence that he knowingly possessed child pornography, and it affirmed the district court's revocation of his supervised release. *Id.* at 4a-10a, 28a; see *id.* at 29a-31a (Kelly, J., concurring in part and dissenting in part). But a majority of the panel concluded that the case should be remanded for further proceedings in which only Section 3583(e)(3), and not Section 3583(k), would apply to the district court's imposition of additional consequences for the supervised-release violation. *Id.* at 28a. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment for at least five years on a finding that a particular type of defendant has violated

supervised release by committing conduct corresponding to certain listed crimes. *Ibid.*; see *id.* at 26a-28a.

a. In the majority's view, Section 3583(k) "violates the Fifth and Sixth Amendments" for two reasons: "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt." App., *infra*, 15a.

As to the first rationale, the court of appeals acknowledged that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—which hold that any fact other than a prior conviction "that, by law, increases the penalty for a crime is an 'element' that must be submitted to a jury and found beyond a reasonable doubt," App., *infra*, 15a-16a (quoting *Alleyne*, 570 U.S. at 103)—apply only to "the criminal prosecution" and not to the revocation of supervised release, *id.* at 17a. "Revocation of supervised release," the court recognized, "is not part of the criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." *Ibid.* (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)).

The majority concluded, however, that Section 3583(k) "violates the Sixth Amendment" under *United States* v. *Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines. App., *infra*, 21a. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant

may be subjected." *Id.* at 20a. The court of appeals observed that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years." *Ibid.* (citing 18 U.S.C. 2252(b)(2)). The court further observed that "[a]fter the judge found, by a preponderance of the evidence" that respondent had violated a condition of his supervised release, Section 3583(k) required respondent to serve "a term of reincarceration of at least five years." *Ibid.* In the majority's view, "[t]his unquestionably increased the mandatory minimum sentence of incarceration to which [respondent] was exposed from no years to five years," thereby "chang[ing] his statutorily prescribed sentencing range" without a jury finding beyond a reasonable doubt. *Id.* at 20a-21a (footnote omitted).

As to the second rationale for its constitutional holding, the court of appeals did not dispute that "committing any crime" could permissibly result in respondent's reimprisonment for up to two years under Section 3583(e)(3). App., *infra*, 22a. But the court took the view that Section 3853(k) "impermissibly requires a term of imprisonment based * * * on the commission of a new offense—namely 'any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.'" *Ibid.* (quoting 18 U.S.C. 3583(k)). The majority reasoned that "[b]y separating [certain] crimes from other violations, § 3583(k) imposes a heightened penalty" that does not depend on the original offense, and "must be viewed, at least in part, as" imposing "punishment for the subsequent conduct" rather than the original offense. *Id.* at 23a. Viewed in that manner, the court concluded, Section 3583(k) invites the double-

jeopardy and jury-trial concerns that this Court avoided in *Johnson* by treating supervised-release revocation as punishment for the original offense. *Id.* at 21a-22a.

b. Judge Kelly dissented from the majority's invalidation of the second and third sentences of Section 3583(k), warning against "jump[ing] ahead of the Supreme Court when it has already spoken on this issue." App., *infra*, 34a; see *id.* at 31a-34a.

Judge Kelly "disagree[d]" with the conclusion, underlying the majority's first constitutional holding, that *Booker* "applies to revocation proceedings." App., *infra*, 31a. He observed that respondent "was tried and found guilty beyond a reasonable doubt of the original offense"; that "those jury-found facts supported the sentence imposed"; that *Booker* had "applied to that sentence"; and that respondent had been "instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked." *Ibid.* "That the full panoply of rights were guaranteed to [respondent] during his initial criminal proceeding," Judge Kelly explained, "does not mean that they attach once more during a revocation proceeding," which "is neither part of th[e] criminal prosecution nor is it a new criminal prosecution." *Id.* at 31a-32a; see *id.* at 31a (citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973)). Judge Kelly found the majority's view that *Booker* would apply to such a proceeding, even though *Apprendi* and *Alleyne* would not, to be "hard to understand * * * under current precedent." *Id.* at 32a.

Judge Kelly additionally observed that this Court "answered the [majority's] second objection to" Section 3583(k) by holding in *Johnson* that "revocation of supervised release is not 'punishment for the violation of

the conditions of supervised release.'" App., *infra*, 32a. He accordingly criticized the majority for "fail[ing] to take the Supreme Court at its word." *Ibid.* And he explained that "under the 'breach of trust' theory applicable to the revocation of supervised release," wherein "'the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust,'" Congress "can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." *Id.* at 33a (quoting Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b)) (brackets in original). He accordingly would have affirmed the district court's reimprisonment of respondent for five years. *Id.* at 34a.

6. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 70a.

REASONS FOR GRANTING THE PETITION

The divided decision below struck down, apparently on their face, multiple portions of a federal statute that plays an important role in protecting the public from harm. The majority's view that the invalidated provisions cannot constitutionally be applied is premised on a novel interpretation of the Fifth and Sixth Amendments (and the supervised-release statute itself) at odds with their text and history, the precedents of this Court, and the statements of other courts of appeals. Nothing in the Constitution requires jury findings beyond a reasonable doubt as a prerequisite to the implementation or administration of a previously imposed sentence. This Court should grant certiorari to correct the court of appeals' error on this significant and recurring question of federal law.

A. The Court Of Appeals Erred In Holding Substantial Portions Of 18 U.S.C. 3583(k) To Be Unconstitutional And Unenforceable

The court of appeals held that the second and third sentences of 18 U.S.C. 3583(k) violated respondent's Fifth and Sixth Amendment rights by requiring the district court, based on its finding that he violated a condition of his release by knowingly possessing child pornography, to revoke his ten-year term of supervised release and return him to prison for at least five years. App., *infra*, 15a-21a. As the dissenting judge recognized, *id.* at 31a-34a, the majority's rationales for that holding are erroneous. The decision below expanded the right to a jury, which expressly applies only to a criminal prosecution, into a right that applies to the administration of the sentence that criminal prosecution produced. The majority then compounded that error by not allowing the government to seek the findings that its constitutional holding would require, and instead simply striking down the lion's share of a federal statute.

1. The district court's enforcement of the conditions of respondent's supervised release under Section 3583(k) did not require a jury finding beyond a reasonable doubt

The district court's factual finding that respondent knowingly possessed child pornography provided a constitutionally sufficient basis for enforcing the conditions of his previously imposed term of supervised release under Section 3583(k).

a. The Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions." U.S. Const. Amend. VI. In a series of decisions beginning with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court has clarified the scope of the Sixth Amendment's jury-trial right and

the "companion right" under the Fifth Amendment to have the jury find each element of a crime "beyond a reasonable doubt." *Id.* at 478; see, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99 (2013); *United States* v. *Booker*, 543 U.S. 220 (2005). Under those precedents, "the essential * * * inquiry is whether a fact is an element of the crime." *Alleyne*, 570 U.S. at 114. A fact is treated as an "element of the crime" if it "'increase[s] the prescribed range of penalties to which a criminal defendant is exposed.'" *Id.* at 111 (quoting *Apprendi*, 530 U.S. at 490).

Applying that rule, this Court has determined that facts increasing a statutory maximum penalty, a statutory minimum penalty, or a mandatory sentencing guidelines range must be found by a jury beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490 (statutory maximum); *Alleyne*, 570 U.S. at 116 (statutory minimum); *Booker*, 543 U.S. at 230-244 (mandatory sentencing guidelines range). The Court has also concluded that facts triggering imposition of "sentences of criminal fines" must be found by a jury, in light of "historical evidence showing that juries routinely found facts that set the maximum amounts of fines" for a given offense. *Southern Union Co.* v. *United States*, 567 U.S. 343, 346, 358 (2012). But "the Court has not extended the *Apprendi* * * * line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions." *Oregon* v. *Ice*, 555 U.S. 160, 163 (2009). Thus, the determination of whether a defendant must serve multiple sentences consecutively or concurrently —"a sentencing function in which the jury traditionally played no part"—does not require findings by a jury beyond a reasonable doubt. *Ibid.*

b. The jury-trial and related due process rights underlying the *Apprendi* line of decisions do not extend to

the district court's order revoking respondent's ten-year term of supervised release and returning him to prison for five years under 18 U.S.C. 3583(k).

The Sixth Amendment applies only to "criminal prosecutions," a term that does not include implementing an already imposed sentence by revoking supervised release and returning a defendant to prison. In describing the "foundation" of the jury trial right, *Apprendi* looked to the historical scope of "criminal proceedings," listing for that purpose "indictment," "trial by jury," and "judgment by court," which it described as corresponding to "the imposition of sentence." 530 U.S. at 478 & n.4. Revocation of supervised release does not fit into any of those stages and accordingly does not implicate the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Ice*, 555 U.S. at 163.

Respondent's "criminal prosecution" ended with the "imposition" of his sentence for possession of child pornography. *Apprendi*, 530 U.S. at 478 n.4. That sentence required him to serve 38 months in prison, to be followed by ten years of supervised release. App., *infra*, 2a. The district court's much later finding that respondent had violated the conditions of his supervised release and accordingly must return to prison for five years as required by Section 3583(k) did not impose a new sentence; it merely administered the sentence respondent had already received. See *Ice*, 555 U.S. at 168 (judicial decision to "administer[]" already imposed sentences consecutively rather than concurrently did not implicate Sixth Amendment rights).

The fact requiring respondent's revocation and reimprisonment—his knowing possession of child pornog-

raphy while on supervised release—arose after the criminal prosecution ended, while he was already serving the resulting sentence. This Court has never applied *Apprendi* to a fact that does not exist until well after the criminal trial has concluded, the jury has been dismissed, and sentence has been imposed. For purposes of the "criminal prosecution[]," U.S. Const. Amend. VI, it is impossible for a not-yet-extant fact to be "an element of a distinct and aggravated crime" that must "be submitted to the jury and found beyond a reasonable doubt," *Alleyne*, 570 U.S. at 116. Respondent's possession of child pornography while on supervised release is instead a fact that relates solely to the implementation of the sentence that the now-disbanded jury's findings authorized.

The district court's application of Section 3583(k) to respondent was constitutional. The jury's conviction of respondent for violating 18 U.S.C. 2252 indisputably authorized a term of supervised release of five years to life. See 18 U.S.C. 3583(k); see also App., *infra*, 27a (finding no constitutional infirmity with that portion of Section 3583(k)). And supervised release, by its nature, is conditional and carries the possibility of reimprisonment if its terms are violated. See *Johnson* v. *United States*, 529 U.S. 694, 700 (2000) (observing that "violations often lead to reimprisonment"). Here, respondent received a ten-year term of supervised release, during which he was entitled to remain outside of prison only so long as he complied with the explicit conditions of that release. After respondent violated those conditions, the district court, in its role as the "oversee[r]" of respondent's sentence, *id.* at 697, constitutionally applied Section 3583(k) to effectively modify that ten-year

term to consist of five years of reimprisonment followed by five years of supervised release.

c. History and precedent confirm that the revocation of respondent's supervised release, and his attendant reimprisonment, are not part of the criminal prosecution and do not require a jury finding beyond a reasonable doubt. See *Southern Union*, 567 U.S. at 353 (explaining that application of *Apprendi* requires a court "to examine the historical record").

The federal government "has long kept track of former federal prisoners" through supervised release and its predecessor, parole. *United States* v. *Kebodeaux*, 570 U.S. 387, 396-397 (2013); see *Johnson*, 529 U.S. at 710. Those systems of provisional release have never required findings of fact by a jury beyond a reasonable doubt before a former prisoner's "conditional liberty" may be revoked. *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972). And because juries have "played no role in" revocation and reimprisonment decisions, judicial factfinding in that context represents "no encroachment * * * by the judge upon facts historically found by the jury," or upon the jury's "traditional domain." *Ice*, 555 U.S. at 168-169; see *id.* at 170 (noting that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law").

Parole and supervised release trace their roots to England's penal colonies in Australia, where officials had authority to grant prisoners "conditional pardons" as early as 1790. 4 U.S. Dep't of Justice, *Attorney General's Survey of Release Procedures: Parole* 11 (1939). That authority evolved into the power to grant a "ticket-of-leave," which allowed a prisoner to earn conditional release for good behavior, but which could be revoked

for misconduct. *Ibid.* States began adopting parole systems in the 19th century. *Id.* at 19. Under a program instituted by a New York reformatory in 1876, "prisoners remained under the supervision of the reformatory for a period of 6 months, during which time their paroles could be revoked if they violated any of the conditions attached to their releases." *Id.* at 19-20; see *Morrissey*, 408 U.S. at 477 (describing evolution of parole).

In 1910, Congress enacted the Parole Act, ch. 387, 36 Stat. 819, which authorized the release of a federal prisoner who had served a portion of his sentence if a parole board found "a reasonable probability that" the prisoner would "live and remain at liberty without violating the laws." §§ 1, 3, 36 Stat. 819. Release on parole was subject to "such terms and conditions" as the parole board "shall prescribe." *Id.* § 3, 36 Stat. 820. A parolee remained "under the control of the warden," who was authorized to "retak[e]" the parolee upon "reliable information that [he] has violated his parole." *Id.* §§ 3, 4, 36 Stat. 820. The parole board could then "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed," with no reduction for "the time the prisoner was out on parole." *Id.* § 6, 36 Stat. 820; see *Anderson* v. *Corall*, 263 U.S. 193, 195-196 (1923) (describing revocation of federal parole).

Consistent with long historical practice, this Court held in *Morrissey* v. *Brewer*, *supra*, that "revocation of parole is not part of a criminal prosecution," because it "arises after the end of the criminal prosecution, including imposition of sentence." 408 U.S. at 480. Accordingly, the Court explained, "the full panoply of rights due a defendant in" a criminal prosecution "does not apply to parole revocations." *Ibid.*; cf. *Samson* v. *California*, 547 U.S. 843, 852 (2006) (holding that parolees have

"severely diminished" Fourth Amendment rights "by virtue of their status alone"). Although a parolee facing revocation is entitled under the Due Process Clause to a hearing before a "'neutral and detached' hearing body such as a traditional parole board," he is not entitled to adjudication by "judicial officers or lawyers," *Morrissey*, 408 U.S. at 489—much less a trial by jury. This Court has likewise held that "there is no right to a jury trial" before revocation of probation—a similar form of conditional liberty. *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984); see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution."); see also *United States* v. *Knights*, 534 U.S. 112, 120 (2001) (observing that probationers "face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt * * * do not apply").

Those holdings about the revocation of parole and probation apply equally in the materially indistinguishable context of the revocation of supervised release. Cf. *Samson*, 547 U.S. at 850 (extending constitutional rule from probation to parole and noting similarity of supervised release). Congress adopted supervised release in 1984 as an incremental improvement on the closely related parole system that it replaced. See *Johnson*, 529 U.S. at 709-711; see also Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987, 1999. Like parole, supervised release provides "limited liberty" to assist former prisoners "'in their transition to community life,'" while at the same time protecting the public and encouraging law-abiding behavior by providing mechanisms for revoking that

conditional liberty. *Johnson*, 529 U.S. at 709, 712 (citation omitted). And in accord with *Morrissey* and past practice, Congress specified that violations of supervised release that "lead to" revocation and "reimprisonment * * * need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* at 700; see 18 U.S.C. 3583(e)(3).

d. The majority below explicitly acknowledged that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." App., *infra*, 17a; see *id.* at 19a n.1. The majority nevertheless reasoned that *Booker* prescribed relevant limitations that would "appl[y] to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release." *Id.* at 19a. That reasoning is unsound.

The rule adopted in *Booker* does not exist apart from the Sixth Amendment. As the majority acknowledged "*Booker* itself relied on the Sixth Amendment." App., *infra*, 20a n.1; see *Booker*, 543 U.S. at 226 ("The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."). Accordingly, the court of appeals' acknowledgment that "the Sixth Amendment's protections cannot be directly invoked" in the context of supervised-release revocation, App., *infra*, 19a n.1, should have foreclosed any application of *Booker*.

The majority below erred in viewing the proceedings at issue in this case as constitutionally indistinguishable from the proceedings at issue in *Booker*. The proceed-

ings at issue in *Booker*—the initial imposition of a sentence following a criminal conviction, see 543 U.S. at 227-228—were unquestionably part of a "criminal prosecution" for Sixth Amendment purposes. Although "proceedings for violations of supervised release" are sometimes referred to as "sentencing" or "resentencing" proceedings, *Johnson*, 529 U.S. at 702, 708, such a proceeding "is not * * * a precise reenactment of the initial sentencing," *id.* at 712. Whatever nomenclature might be used to describe it, a supervised-release revocation proceeding remains a postjudgment proceeding aimed at determining the appropriate consequences for the defendant's violation of the conditions under which he had been allowed to serve part of his sentence outside of a prison. It is neither a replacement for, nor a continuation of, the original sentencing. Cf. *Dillon* v. *United States*, 560 U.S. 817, 828 (2010) (holding that *Booker* does not apply to postjudgment sentence-modification proceedings under 18 U.S.C. 3582(c)(2)).

The majority below thus had no basis to view the five-year minimum period of reimprisonment for a supervised-release violation required by Section 3583(k) as an "increase[]" above the zero to ten-year "term of imprisonment" that "the sentencing judge was authorized to impose" at respondent's original sentencing. App., *infra*, 20a. The judge imposed a term of imprisonment between zero and ten years—38 months—at the original sentencing, and respondent completed that term. *Id.* at 2a. But the judge at the original sentencing also separately imposed a ten-year term of supervised release, which respondent began serving after his discharge from prison. *Ibid.* The proceeding in this case was an administration of that supervised release—namely, a retraction of respondent's conditional liberty

—not a new sentence that would override the already completed original 38-month prison term.

To the extent the majority below viewed a jury finding as necessary to trigger the five-year minimum period of reimprisonment under 18 U.S.C. 3583(k), rather than the zero to two-year term of reimprisonment authorized by 18 U.S.C. 3583(e)(3), that view was equally mistaken. Because the revocation and reimprisonment were part of the implementation, rather than the imposition, of respondent's sentence, they were not part of the "criminal prosecution," and the right to a jury finding beyond a reasonable doubt therefore does not apply. The majority below did not dispute that a judicial finding by a preponderance of the evidence would be sufficient to authorize at least *some* reimprisonment—namely, reimprisonment under Section 3583(e)(3). See, *e.g.*, App., *infra*, 15a, 28a. The constitutional sufficiency of such a finding cannot be a function of the *particular* range that Section 3583(e)(3) specifies, which Congress had the power to set at a higher level. And that is exactly what Congress did in Section 3583(k).

Nothing in the *Apprendi* line of cases suggests that alternative ranges, applicable in the same context, might require *different* standards of proof. To the contrary, the central teaching of *Apprendi* is that the *same* standard applies to each. During the criminal prosecution, an "aggravated crime" and the "core crime" both require a jury finding of each element (other than a prior conviction) beyond a reasonable doubt. *Alleyne*, 570 U.S. at 113. The element that makes the crime "aggravated," rather than "core," does not require proof by some yet higher standard; the point is instead that the aggravating element should be treated the same as the

others. *Ibid.* As the court of appeals recognized, judicial findings by a preponderance of the evidence are generally sufficient in the context of a supervised-release revocation, which is outside the criminal prosecution. App., *infra*, 19a n.1. Nothing in *Apprendi* or its progeny supports applying that standard to reimprisonment under Section 3583(e)(3), but a more stringent standard to reimprisonment under Section 3583(k), simply because the latter requires a higher range. The contrary view of the majority below, therefore, not only improperly extended the *Apprendi* rule to a proceeding in which it textually, historically, and jurisprudentially does not apply—it was also based on an erroneous understanding of that rule.

2. The application of Section 3583(k) did not unconstitutionally punish respondent for new criminal conduct

The fact that Section 3583(k)'s application is triggered by a supervised-release violation that corresponds to one of several listed criminal offenses does not change the constitutional analysis.

As this Court recognized in *Johnson*, "[w]here the acts of violation [of supervised-release conditions] are criminal in their own right, they may be the basis for separate prosecution." 529 U.S. at 700. In such a separate prosecution, which would provide the predicate for a separate criminal punishment, the jury trial and related due process rights discussed in *Apprendi* would of course apply. But in the context of supervised-release revocation, the Court has construed the consequences of the defendant's violation as "part of the penalty for the initial offense," not a new one. *Ibid.*

The possibility of *independent* prosecution and punishment does not transform the district court's supervision of respondent's *preexisting* punishment into a

criminal prosecution. It would make little sense for a judicial finding to allow for revocation of supervised release and reimprisonment only when the conduct is *not* serious enough to match the definition of a criminal offense. The Constitution cannot reasonably be construed to permit revocation and reimprisonment based on a judicial finding of (for example) failure to attend mandatory counseling, but to forbid revocation and reimprisonment based on a judicial finding of (for example) sexual abuse of a child.

The majority below acknowledged as much. It recognized that a judicial finding that a defendant "commit[ted] a[] crime" can provide the basis for revocation of supervised release and reimprisonment under Section 3583(e)(3). App., *infra*, 22a. It believed, however, that a different rule applies to revocation of supervised release and reimprisonment under Section 3583(k). In its view, Section 3583(k) impermissibly punishes new criminal conduct because it does not apply to all supervised-release violations that correspond to criminal offenses (as Section 3583(e)(3) does), but instead applies only to supervised-release violations that correspond to the particular listed criminal offenses. See *id.* at 23a.

That reasoning is flawed. As a threshold matter, it runs counter to this Court's own reasoning in *Johnson*, which "attribute[d] postrevocation penalties to the original conviction" precisely to *avoid* the constitutional difficulties that the view of the majority below invites. 529 U.S. at 701; see *id.* at 700-701. In any event, as the dissenting judge below recognized, "Congress can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." App., *infra*, 33a. Nothing requires

that every possible supervised-release violation result in reimprisonment for the exact same length of time. This Court has viewed "postrevocation sanctions as part of the penalty for the initial offense," *Johnson*, 529 U.S. at 700, notwithstanding that the sanctions are indeterminate and thus may turn in part on factors such as the severity of the violation and its relationship to the original offense of conviction, see, *e.g.*, *id.* at 697, 712; see also Sentencing Guidelines § 7B1.1 (classifying supervised-release violations based on seriousness of the defendant's conduct). The fact that Congress has codified its own judgments about the appropriate amount of reimprisonment in certain circumstances does not transform a supervised-release-revocation proceeding into a criminal prosecution.

3. Section 3583(k) can be enforced even if the jury trial and related due process rights apply

After erroneously finding major portions of Section 3583(k) "unconstitutional," the court of appeals committed an additional error by deeming them "unenforceable." App., *infra*, 28a. As the majority below recognized, a court that has found part of a federal statute unconstitutional "must 'refrain from invalidating more of the statute than is necessary.'" *Id.* at 26a (quoting *Booker*, 543 U.S. at 258). Even if the decision below were correct that revocation and reimprisonment under Section 3583(k) are unconstitutional in the absence of a jury finding beyond a reasonable doubt, the appropriate remedy would have been to require such a finding as a prerequisite to enforcement of the statute. It was not "'necessary'" to find the statute "unenforceable." *Id.* at 26a, 28a.

This Court's approach in *Southern Union* is instructive. The Court there concluded that facts justifying the imposition of particular criminal fines must be found by

a jury beyond a reasonable doubt. 567 U.S. at 360. The Court did not, however, find the statute at issue unenforceable. The Court instead held "that the rule of *Apprendi* applies to the imposition of criminal fines" and remanded for further proceedings consistent with its opinion. *Ibid.*; cf. *United States* v. *O'Brien*, 560 U.S. 218, 235 (2010) (holding that statutory sentencing enhancement provision required submission of facts to the jury, not that the provision was unenforceable); *Jones* v. *United States*, 526 U.S. 227, 251-252 (1999) (similar). At a minimum, the majority below should have adopted a similar course, and allowed the United States to continue enforcing the statutory provisions that Congress enacted in a way that complies with the majority's understanding of the Constitution.

Nothing in the text of Section 3583(k) precludes such a remedy. Section 3583(k) requires a court to "revoke the term of supervised release and require the defendant to serve a term of imprisonment under" Section 3583(e)(3) when the defendant has engaged in certain conduct. 18 U.S.C. 3583(k). Section 3583(e)(3), in turn, authorizes revocation and reimprisonment based on a judicial finding "by a preponderance of the evidence," in accordance with the Federal Rules of Criminal Procedure. 18 U.S.C. 3583(e)(3); see *Johnson*, 529 U.S. at 700; Fed. R. Crim. P. 32.1(b). A constitutional requirement of a jury finding beyond a reasonable doubt is not incompatible with the statutory requirement of a finding by a judge by a preponderance of the evidence. Permitting enforcement of Section 3583(k) so long as both findings are made would have honored Congress' directive that sex offenders like respondent receive substantial terms of reimprisonment for violating the conditions of their supervised

release, while also complying with the majority's understanding of the Fifth and Sixth Amendments.

B. The Question Presented Warrants This Court's Review

This case warrants certiorari because the decision below struck down substantial portions of a federal statute. It also introduced an irreconcilable anomaly into the otherwise uniform view of the courts of appeals that the right to a jury finding beyond a reasonable doubt does not apply to supervised-release revocation and reimprisonment.

1. The Court should grant review because the decision below invalidated multiple portions of a federal statute. App., *infra*, 28a. This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *Kebodeaux*, 570 U.S. at 391; see also, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Comstock*, 560 U.S. 126 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

Review is particularly appropriate here because the decision below invalidated provisions of a federal statute designed to protect the public against serious harm. Congress enacted the second and third sentences of

18 U.S.C. 3583(k) in the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 603, which it adopted "to protect the public from sex offenders and offenders against children," *id.* § 102, 120 Stat. 590. This Court has likewise recognized the "threat" of "[c]hild pornography," which "harms and debases the most defenseless of our citizens," *Williams*, 553 U.S. at 307, and the "public safety concerns" presented by the heightened rates of recidivism among sex offenders, *Kebodeaux*, 570 U.S. at 395. The Court has accordingly granted review in a number of cases in which lower courts held unconstitutional provisions of statutes designed to protect the public against those dangers, including two cases in which lower courts struck down provisions of the Adam Walsh Act itself. See *id.* at 399 (reversing court of appeals and upholding provisions of Adam Walsh Act); *Comstock*, 560 U.S. at 149-150 (same); see also *Williams*, 553 U.S. at 307 (reversing court of appeals and upholding ban on pandering or soliciting child pornography); *Smith* v. *Doe*, 538 U.S. 84, 105-106 (2003) (reversing court of appeals and upholding sex-offender registration requirement).

The statutory provisions invalidated here, moreover, are important to the system of federal supervised release. Nearly 135,000 former federal inmates are currently on supervised release, including nearly 9000 serving a term of supervised release for sex offenses. Administrative Office of the U.S. Courts, *Judicial Business 2017 Tables: Federal Probation System*, Tbls. E-2, at 1, E-3, at 1, http://www.uscourts.gov/statistics-reports/judicial-business-2017-tables. Last year, courts revoked the supervised release of more than 11,500 former federal inmates or probationers. *Id.* Tbl. E-7A. In more

than 3300 of those cases, revocation was based on the commission of major new offenses, including sex crimes. *Ibid.*

Although no statistics exist on the exact number of applications of the second and third sentences of 18 U.S.C. 3583(k), the Department of Justice's experience is that those provisions are applied with some frequency. See, *e.g.*, *United States* v. *Beyers*, 854 F.3d 1041 (8th Cir.) (affirming five-year mandatory reimprisonment under Section 3583(k) for violation of supervised-release conditions), cert. denied, 138 S. Ct. 462 (2017); *United States* v. *Terry*, 690 Fed. Appx. 358 (6th Cir. 2017) (per curiam) (same); *United States* v. *Nesler*, 659 Fed. Appx. 251 (6th Cir. 2016) (same). The provisions will likely be triggered even more frequently in the future given the large number of sex offenders on supervised release and the long terms of supervised release many are serving. See 18 U.S.C. 3583(k) (authorizing life term of supervised release); see, *e.g.*, *United States* v. *Trailer*, 827 F.3d 933, 936-938 (11th Cir. 2016) (upholding life term of supervised release imposed under Section 3583(k)); *United States* v. *James*, 792 F.3d 962, 967-969 (8th Cir. 2015) (same); *United States* v. *Helton*, 782 F.3d 148, 154-155 (4th Cir. 2015) (same).

2. Although the court of appeals' invalidation of multiple provisions of a federal statute in itself provides a sufficient basis for certiorari, the appropriateness of this Court's review is heightened here by the court of appeals' creation of an erroneous exception to a rule of law that is otherwise uniform across the circuits.

Every court of appeals to have addressed the question has concluded that the Sixth Amendment right under the Jury Trial Clause and the related due process right to factual findings beyond a reasonable doubt do

not apply to revocations of supervised release and subsequent orders of reimprisonment. See *United States* v. *Work*, 409 F.3d 484, 491-492 (1st Cir. 2005); *United States* v. *Carlton*, 442 F.3d 802, 806-810 (2d Cir. 2006); *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), cert. denied, 552 U.S. 830 (2007); *United States* v. *Ward*, 770 F.3d 1090, 1096-1099 (4th Cir. 2014); *United States* v. *Hinson*, 429 F.3d 114, 117-119 (5th Cir. 2005), cert. denied, 547 U.S. 1083 (2006); *United States* v. *Johnson*, 356 Fed. Appx. 785, 790-792 (6th Cir. 2009) (Moore, J., joined by O'Connor, J., sitting by designation); *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.), cert. denied, 563 U.S. 951 (2011); *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 628-629 (9th Cir. 2014), cert. denied, 136 S. Ct. 225 (2015); *United States* v. *Cunningham*, 607 F.3d 1264, 1266-1268 (11th Cir.), cert. denied, 562 U.S. 971 (2010); cf. *United States* v. *Owen*, 854 F.3d 536, 541 (8th Cir. 2017) (holding that the "Sixth Amendment right to counsel" does not apply in supervised-release revocation proceedings); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) (same with respect to Sixth Amendment Confrontation Clause); *United States* v. *House*, 501 F.3d 928, 931 (8th Cir. 2007) (same with respect to "Sixth Amendment speedy trial right").

Indeed, an earlier decision of the Tenth Circuit itself recognized that "[i]t is well-settled that supervised release is 'part of the penalty for the initial offense,' and that 'once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence have not been subject to Sixth Amendment protections.'" *United States* v. *Cordova*, 461 F.3d 1184, 1186 (2006) (brackets and citations omitted); cf. *United States* v. *Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017)

(Gorsuch, J.) (stating that "the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings"). The majority below purported to follow that decision, justifying its holding on the theory that Section 3583(k) is a special exception to the general rule. See App., *infra*, 17a, 19a n.1. But as the dissenting judge observed, the majority's underlying rationale "seems" to apply to "all revocation proceedings," *id.* at 31a, and its ultimate result is in tension with other circuits' statements suggesting that the jury-trial right categorically does not apply.

The decision below is in even greater tension with the Fourth Circuit's decision in *United States* v. *Ward*, *supra*, which rejected a Sixth Amendment challenge to a since-repealed provision of 18 U.S.C. 3583(g) (1988) that required a district court to revoke a defendant's term of supervised release and order him to "serve in prison not less than one-third of th[at] term" if the court found, by a preponderance of the evidence, that the defendant possessed a controlled substance while on supervised release. 770 F.3d at 1093 (quoting 18 U.S.C. 3583(g) (1988)). The Fourth Circuit explained that "in contrast to the criminal trials at issue in *Alleyne* and *Apprendi*, supervised release revocation proceedings are not considered part of a criminal prosecution." *Id.* at 1097. And the court reasoned that "the constitutional protections afforded in a criminal trial are not co-extensive with the rights applicable in post-conviction proceedings such as supervised-release revocation hearings," in part because individuals on supervised release—like those on parole—"enjoy only 'conditional liberty' because they have already been convicted of the underlying criminal offense." *Id.* at 1097-1098. *Ward* involved a different mandatory revocation and reimprisonment

provision than the one at issue here, but the Fourth Circuit's reasoning in that decision cannot be squared with the reasoning of the decision below.

Although no court of appeals has directly rejected a preserved challenge to the constitutionality of Section 3583(k), and thus no square conflict exists, the question presented has been and continues to be raised in other circuits. See *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (9th Cir. 2017) (rejecting plain-error claim challenging Section 3583(k) on Sixth Amendment grounds), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018); see also *United States* v. *Hollman*, appeal pending, No. 18-1874 (7th Cir. filed Apr. 23, 2018) (raising question presented). The decision below will create incentives for further litigation, which will inevitably result in either a full-blown circuit conflict or more widespread and erroneous invalidation of the federal statute at issue. This Court's intervention is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
ERIC J. FEIGIN
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
STRATTON C. STRAND
Attorney

JUNE 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-5156

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDRE RALPH HAYMOND, DEFENDANT-APPELLANT

**APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:08-CR-00201-TCK-1)**

[Filed: Aug. 31, 2017]

Before: KELLY, BRISCOE, and MCHUGH, Circuit Judges.

BRISCOE, Circuit Judge.

The district court revoked Andre Ralph Haymond's supervised release based in part on a finding that Haymond knowingly possessed thirteen images of child pornography. The district court imposed the mandatory minimum sentence required by 18 U.S.C. § 3583(k). Haymond appeals and argues that the evidence was insufficient to support a finding by a preponderance of the evidence that he possessed child pornography, and that 18 U.S.C. § 3583(k) is unconstitutional because it violates his right to due process.

We conclude that the evidence was sufficient to support the district court's finding that Haymond violated

the conditions of his supervised release, but we agree that 18 U.S.C. § 3583(k) is unconstitutional because it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and it imposes heightened punishment on sex offenders based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt. Thus, we affirm the district court's revocation of Haymond's supervised release, but we vacate Haymond's sentence and remand for resentencing.

I

On January 21, 2010, Haymond was convicted by a jury of one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). Aplt. App. vol. I, at 29. For this offense, Haymond was sentenced to thirty-eight months of imprisonment, to be followed by ten years of supervised release. Id. at 30-31. Haymond began serving his supervised release on April 24, 2013. Id. at 144.

On October 22, 2015, at 6:00 am, probation officers conducted a surprise search of Haymond's apartment. Id. at 145. The officers seized a password-protected Samsung cellular Android phone belonging to Haymond, a personal computer belonging to Haymond, a personal computer belonging to Haymond's roommate, and two other computers found in the kitchen area. Id.

A probation officer conducted a forensic examination of Haymond's phone using a Cellebrite device, which extracts the flash memory of the phone for ex-

amination. Id. This examination revealed web history for only October 21, 2015, indicating that all prior history had been deleted. Id. at 146. The web history for October 21 contained numerous websites with titles indicative of sexually explicit material. Id. (listing websites). The forensic examination of Haymond's phone also revealed fifty-nine images that the FBI's Internet Crime Task Force identified as child pornography. Id. at 147.

Based on these findings, Haymond's probation officer alleged that Haymond had committed five violations of his supervised release: (1) possession of fifty-nine images of child pornography, in violation of the mandatory condition that Haymond not commit another federal, state, or local crime; (2) failure to disclose to the probation office all internet devices he possessed, in violation of a special computer restriction; (3) possession of numerous sexually explicit images on his phone, in violation of a special condition that he not view or possess pornography; (4) failure to install and pay for computer monitoring software, in violation of a special monitoring condition; and (5) failure to attend sex offender treatment on fifteen occasions, in violation of a special condition that he participate in treatment. Id. at 142.

The district court found, by a preponderance of the evidence, that Haymond had committed all five violations, but, with respect to the first alleged violation, possession of child pornography, the court concluded that Haymond had possessed only the thirteen images located in his phone's gallery cache, not the other forty-six images located in other portions of the phone's cache. Id. Because the possession of child pornogra-

phy triggered a mandatory minimum sentence of five years' reincarceration, under 18 U.S.C. § 3583(k), the judge sentenced Haymond to five years' reincarceration, to be followed by a five-year term of supervised release. Id. at 191-92, Aplt. App. vol. III, at 152.

Haymond appeals and challenges only the first of these alleged violations. He argues: (1) that the presence of images in his phone cache was insufficient to show by a preponderance of the evidence that he knowingly possessed child pornography, and (2) that 18 U.S.C. § 3583(k) is unconstitutional because it deprives him of due process. Aplt. Br. at 2-4.

II

"We review the district court's decision to revoke supervised release for abuse of discretion." United States v. Jones, 818 F.3d 1091, 1097 (10th Cir. 2016) (quoting United States v. LeCompte, 800 F.3d 1209, 1215 (10th Cir. 2015)). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." United States v. Battle, 706 F.3d 1313, 1317 (10th Cir. 2013). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017) (quoting In re Vaughn, 765 F.3d 1174, 1180 (10th Cir. 2014)).

Here, the district court abused its discretion by relying on a clearly erroneous finding of fact that "Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing posses-

sion." Aplt. App. vol. I, at 164. Nonetheless, the remaining evidence in the record was sufficient to support a finding, by a preponderance of the evidence, that Haymond knowingly possessed the thirteen images of child pornography located in the Gallery cache of his smart phone.

The only expert testimony regarding the Gallery cache function on Haymond's smart phone came from David Penrod, who testified as an expert for Haymond; the prosecution did not provide any expert testimony. Id. at 166. With respect to all fifty-nine images, Penrod testified that the presence of the images in the phone's cache did not indicate whether or not the user had viewed the images or knew of their existence. Aplt. App. vol. II, at 128 ("With Internet cache databases, all that information is automatically downloaded in the background without the user's knowledge."); id. at 163-64 (A user may not know images in the Gallery cache exist "because the Gallery3D cache database contains images from all over the phone, not just from one particular folder on the phone."); id. at 140 ("[T]he fact [the apk file is] still sitting there in the download folder is very strong evidence that the user had no knowledge that this file was there."). Further, Penrod testified that all the images were thumbnails, indicating that the user had not clicked on them because, if the user had viewed an enlarged image, that enlarged image would also appear in the cache. Id. at 130-32. The images did not include any metadata, so it was impossible to determine when the images came to be on the phone, except to say "that they arrived in the cache file of the phone at some point prior to seizure." Aplt. App. vol. I, at 149; Aplt. App. vol. II, at 135-36.

Penrod also testified that Android smart phone users can easily access their photo gallery through the Gallery3D application and can look through the photos in that application. Aplt. App. vol. II, at 158. He was then asked this question: "So a cached file from the Gallery indicates that, just the same way as for the Samsung browser, that at one point an image that corresponded to that cached file was present in that application?" Id. at 159. He responded, "Correct." Id.

Further, Penrod's testimony makes clear that images can appear in the Gallery3D application without a user taking any volitional action to place them there. Penrod testified that "the gallery cache functions in the same way that the browser cache does: it's a cached database and it contains thumbnails." Id. at 163. He stated that the Gallery3D application searches the phone for all images on the phone. Id. ("[I]t's going to go out and look for actual images throughout the phone."). Therefore, he testified that a user might not know about all the images in the Gallery cache. Id. at 163-64.

After recounting this testimony, the district court concluded, "[b]ased on this testimony and other circumstantial evidence," that it was "more likely than not that Haymond knowingly possessed the Gallery Images at a point in time prior to search of the phone." Aplt. App. vol. I, at 163. Specifically, the court made the following findings:

- "Haymond had nearly exclusive use and possession of his password-protected phone," id. at 163-64;

- Only Haymond "possessed the phone at relevant times," id. at 164;
- "[O]nly those images actually 'on the phone' (and not images merely accessed or viewed on the phone using a browser application) would have a "gallery 3d" path when found in the cache," id. (quoting Aplt. App. vol. II, at 168);
- "[O]n the phone" means "*saved, downloaded, or otherwise* accessible on the phone in some application for viewing at the user's discretion," id. (emphasis added);
- "*Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession,*" id. (emphasis added);
- "[T]hese 13 images previously resided in an accessible area of Haymond's phone and were under his control," id.;
- "*[T]he path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images,*" id. (emphasis added);
- Unlike the Browser Images or the APK Images, "the 13 Gallery Images depict sexual acts between young boys or between boys and adult males," which is "consistent with images forming the basis of Haymond's original conviction," id. at 165.

The portions in italics are clearly erroneous because the district court expressly relied on Penrod's testimony as support, but these findings are actually contradicted by Penrod's testimony. We agree with the district court that "[s]aving, downloading, or otherwise

placing the image in an application on the phone is a similar volitional act" to the "volitional downloads from Limewire" that supported Haymond's original conviction. See id. at 164. But Penrod's testimony supports only a finding that the images were at some point accessible on Haymond's phone, not that Haymond necessarily saved, downloaded, or otherwise placed them there. Penrod's testimony cannot be construed to indicate either that Haymond knew the images were in the Gallery3D application, or that he took any volitional action to cause them to be there.

Even if this was not clear from Penrod's testimony at the hearing, Haymond submitted a letter from Penrod clarifying that, "[w]ithout additional information about them, the most one can say about the photographs linked to thumbnail images in the Gallery3D cache database is that they were on the phone at one time." Id. at 186. Penrod gave five examples of ways the images might have arrived on Haymond's phone without Haymond's knowledge or volitional acts, including as zip file attachments to emails, as text messages sent without Haymond's consent, as attachments to messages on social media sites, as part of a mass file transfer from a computer, or downloaded from the internet as part of a set. Id. According to Penrod, "[o]pening the transferred archives, folders, or sets would have launched the phone's Gallery3D service. The service would have automatically scanned the contents of the new directories, extracted thumbnail images from all the photos within them, and stored the thumbnails in the Gallery3D cache database." Id. Penrod stated unequivocally:

> The mere fact that these thumbnail images are in the Gallery3D cache database does not mean, however, that Mr. Haymond had viewed their full size counterparts or even knew of their existence. The thumbnails in the cache database also do not mean that Mr. Haymond caused the full size versions to be transferred to his phone.

Id. The district court should not have concluded the opposite from Penrod's testimony. The district court's finding that "the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images," id. at 168, was not supported by any evidence in the record, so it was clearly erroneous.

When this incorrect finding is excluded, we are left with the following:

- Haymond had nearly exclusive use and possession of his password-protected phone and only Haymond possessed the phone at relevant times;
- At some point, thirteen images of child pornography were accessible somewhere on Haymond's phone;
- The images depict sexual acts between young boys or between boys and adult males, which is consistent with images forming the basis of Haymond's original conviction.

This is a close case, even under a preponderance of the evidence standard, but we conclude this evidence is sufficient to support a conclusion that Haymond knowingly possessed the thirteen images located in the Gallery cache of his smart phone.

It is undisputed that the images were once accessible on Haymond's smart phone; the only debate is

whether he knew the images were there. We must then decide whether it is "more likely than not" that Haymond knew about the images. From Penrod's testimony, the images could have come to be in the phone's Gallery3D application via an automatic process related to, for example, a zip file or mass file transfer, but Penrod also could not rule out the possibility that Haymond saved the images to the Gallery3D application on his phone. Although it is ***possible*** that the images of child pornography were downloaded into Haymond's smart phone's Gallery cache through an automatic process of which he was unaware, we conclude it is ***more likely than not*** that Haymond did in fact download and save the images. Such a volitional act would constitute knowing possession. Thus, the evidence in the record is sufficient to support a finding, by a preponderance of the evidence, that Haymond knowingly possessed child pornography, in violation of the conditions of his supervised release.

III

Because we conclude that the evidence was sufficient to support Haymond's violation for possession of child pornography, we are left with the constitutional question presented. On that issue, we conclude that § 3583(k) is unconstitutional because it changes the mandatory sentencing range to which a defendant may be subjected, based on facts found by a judge, not by a jury, and because it punishes defendants for subsequent conduct rather than for the original crime of conviction.

"We review the constitutionality of a statute de novo." United States v. Berres, 777 F.3d 1083, 1087 (10th Cir. 2015). But we may "invalidate a congres-

sional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." United States v. Morrison, 529 U.S. 598, 607 (2000); United States v. White, 782 F.3d 1118, 1123 (10th Cir. 2015) (quoting Morrison). It is plain here on the face of the statute that Congress has done just that.

Imposition of supervised release is governed by 18 U.S.C. § 3583. The court, when imposing a sentence following a felony or misdemeanor conviction, may include a term of supervised release "as a part of the sentence." 18 U.S.C. § 3583(a). The statute ties the applicable length of supervised release to the crime of conviction; it provides for up to five years of supervised release for a Class A or Class B felony, up to three years for a Class C or Class D felony, and up to one year for a Class E felony, or for a misdemeanor (other than a petty offense). Id. § 3583(b). For certain specific crimes, including Haymond's original crime of conviction, a separate subsection authorizes a term of supervised release of at least five years and up to life. Id. § 3583(k). In all cases, the term of supervised release authorized is dependent on the severity of the defendant's original crime of conviction.

The court may impose conditions on the defendant during the term of supervised release, and must impose certain mandatory conditions, including the condition "that the defendant not commit another Federal, State, or local crime during the term of supervision." Id. § 3583(d).

The court may modify or revoke the term or conditions of supervised release. Id. § 3583(e). Most revocations are governed by § 3583(e)(3), which provides that the court, if it "finds by a preponderance of the

evidence that the defendant violated a condition of supervised release," may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision . . . except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

Id. § 3583(e)(3). Again, the maximum terms of reimprisonment authorized by the statute for violations of the conditions of supervised release are limited based on the severity of the defendant's original crime of conviction, not the conduct that resulted in the revocation. Id.; United States v. Collins, 859 F.3d 1207, 1218 (10th Cir. 2017).

The United States Sentencing Commission must promulgate and distribute "guidelines or general policy statements regarding . . . the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18." 28 U.S.C. § 994(a)(3). Accordingly, the Commission has issued policy statements regarding the revocation of supervised release. According to the Sentencing Guidelines Manual, "at revocation the court should sanction primarily the defendant's

breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S. Sentencing Guidelines Manual Ch. 7, Pt. A, introductory cmt. (3)(b) (U.S. Sentencing Comm's 2016). "The revocation policy statements categorize violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations." Id. Ch. 7, Pt. A, introductory cmt. 4; id. § 7B1.1(a). "The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, fix the applicable sentencing range." Id. Ch. 7 Pt. A, introductory cmt. 4; id. §§ 7B1.3; 7B1.4. The recommended terms of reimprisonment following revocation of supervised release range from three months to sixty-three months. Id. § 7B1.4(a). In all cases, the recommended term of reimprisonment must be within the statutorily authorized range. Id. § 7B1.4(b).

The court may impose an additional term of supervised release to follow the term of reimprisonment. Id. § 3583(h). The length of a subsequent term of supervised release "shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Id. Thus, with regard to any subsequent terms of supervised release, the maximum length of those terms is also based upon the original crime of conviction, not the new conduct.

A special provision, the one challenged here, then provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Id. § 3583(k).

Haymond's original crime of conviction, one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), is a Class C felony. 18 U.S.C. § 3359(a)(3). The statutory penalty for violation of 18 U.S.C. § 2252(a)(4)(B) is a fine or imprisonment up to ten years, or both. Id. § 2252(b)(2). The supervised release statute also requires a mandatory term of supervised release of five years to life. Id. § 3583(k). If a court later finds the defendant has violated the conditions of that supervised release it might revoke the term of supervised release and impose a term of reimprisonment. Id. § 3583(e)(3), (k). Most violations fall under § 3583(e)(3), which, based on Haymond's original conviction for a Class C felony, authorizes a subsequent term of imprisonment of no more than two years. Id. A violation that is

the commission of "any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed," however, is governed instead by § 3583(k), which, when read with § 3583(e)(3), requires a mandatory term of reimprisonment of at least five years and up to life. Id. § 3583(e)(3), (k).

If not for the mandatory minimum sentence required by § 3583(k), the sentence Haymond received following revocation of his supervised release would have been significantly lower—two years at most. Id. § 3583(e)(3). The sentencing judge stated on the record that, "were there not this statutory minimum, the court would have looked at this as a grade B violation and probably would have sentenced in the range of two years or less." Aplt. App. vol. III, at 152.

We conclude that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished.

First, 18 U.S.C. § 3583(k) is unconstitutional because it increases the mandatory minimum penalty to which a defendant may be subjected, and does so based on facts not found by the jury. According to the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151 (2013), "[a]ny fact that, by law,

increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 133 S. Ct. at 2155. This includes any fact that increases either the mandatory minimum or the statutory maximum. Id.

But "[e]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Id. at 2163 (quoting Apprendi, 530 U.S. at 519). "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." United States v. Booker, 543 U.S. 220, 233 (2005). "[W]hen a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Id. In this context, discretion is key; the Supreme Court held in United States v. Booker, 543 U.S. 220 (2005), that the Sentencing Guidelines must be advisory, not mandatory, in order to avoid violating the Sixth Amendment right to a trial by jury. Id. at 245-46.

In other words, the facts which determine the mandatory sentencing range must be decided by a jury. Alleyne, 133 S. Ct. at 2155. The judge may make factual findings that will impact the sentence imposed within that range, but the judge must retain discretion as to the sentence that will be imposed based on those facts. Booker, 543 U.S. at 233.

The government argues that, because Alleyne and Apprendi do not apply to revocation proceedings, Booker also does not apply. Aple. Br. at 20-26. We disagree because Alleyne and Apprendi apply to crim-

inal prosecutions, but Booker applies to sentencing. "Criminal proceedings generally unfold in three discrete phases": investigation, criminal prosecution, and sentencing. Betterman v. Montana, __ U.S. __, 136 S. Ct. 1609, 1613, (2016). The due process protections afforded to defendants vary with each phase. Cf. id. at 1613-18 (describing the protections against delay at each phase).

Apprendi and Alleyne apply to the second phase, the criminal prosecution. They establish the protection that each element of the crime be submitted to the jury and proved beyond a reasonable doubt. Revocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); United States v. Cordova, 461 F.3d 1184, 1186-88 (10th Cir. 2006) (citing Morrissey and explaining "why jury trial rights do not attach to revocation proceedings").

Booker, on the other hand, applies to the third phase, sentencing. During sentencing, unlike in a criminal prosecution, the judge may find additional facts and use those facts to impose any sentence within the statutory range; the defendant has no right to a jury trial on these additional facts. Booker, 543 U.S. at 233 ("[W]hen a trial judge exercises his [or her] discretion to select a specific sentence within a defined range, the defendant has no right to a jury determina-

tion of the facts that the judge deems relevant.") However, Booker requires that the sentencing judge maintain discretion and, consequently, that the Sentencing Guidelines be viewed as advisory, not mandatory. Id. at 245.

Supervised release, including the term, conditions, revocation, and modification, is part of the sentence for the defendant's original crime of conviction. 18 U.S.C. § 3583(a) (referring to supervised release as "a part of the sentence"); id. § 3585(c), (d)(1), (d)(2), (e) (instructing courts, when imposing a term of supervised release, setting the conditions of supervised release, and terminating, extending, or revoking supervised release, to consider the § 3553(a) factors, which are "[f]actors to be considered in imposing a sentence," 18 U.S.C. § 3553(a)); Johnson v. United States, 529 U.S. 694, 700 (2000) (requiring courts to "[t]reat[] postrevocation sanctions as part of the penalty for the initial offense" in order to avoid "serious constitutional questions"); Collins, 859 F.3d at 1218 n.8 (referring to "the appropriate sentence following a violation of supervised release conditions" (emphasis added)); United States v. Lonjose, 663 F.3d 1292, 1297 n.3 (10th Cir. 2011) ("[C]onditions of supervised release are part of the Defendant's sentence."). Further, the United States Sentencing Guidelines, which were the subject of Booker, include policy statements regarding revocation of supervised release. 28 U.S.C. § 994(a)(3) (instructing the United States Sentencing Commission to promulgate and distribute "guidelines or general policy statements regarding . . . the provisions for modification of the term or conditions of supervised release and revocation of supervised release"); U.S. Sentencing Guidelines Manual Ch. 7 (setting forth policy statements

regarding violations of supervised release). Booker's requirement that the sentencing judge retain discretion applies to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release.[1]

---

[1] To the extent anyone argues that defendants serving terms of supervised release have no Sixth Amendment rights at all, and thus cannot benefit from the Court's decision in Booker, this assertion is stated too broadly.

It is true that, by its text, the procedures required by the Sixth Amendment apply only in "criminal prosecutions." U.S. Const. Amend. VI ("In all criminal prosecutions . . . "). Revocation is a part of the sentencing, not a part of the criminal prosecution, so the Sixth Amendment's protections cannot be directly invoked. Cordova, 461 F.3d at 1186 (quoting United States v. Work, 409 F.3d 484, 491 (1st Cir. 2005), for the proposition that "once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence [have not been] subject to Sixth Amendment protections"); Jones, 818 F.3d at 1102 ("The parties agree our case law holds that the Sixth Amendment does not apply to revocation hearings."); Curtis v. Chester, 626 F.3d 540, 544 (10th Cir. 2010) ("Sixth Amendment rights are not applicable in parole revocation hearings because those hearings are not 'criminal prosecutions.'"). Instead, general principles of due process govern the procedures that must be afforded a defendant in a revocation proceeding. Morrissey, 408 U.S. at 482 (holding "that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others" and going on to discuss what process is due).

But holding that the Sixth Amendment does not require particular procedures in a revocation hearing is not the same as holding that a defendant, once convicted of any crime, loses all Sixth Amendment rights during the term of imprisonment and supervised release. To the contrary, we know that these defendants retain the right to be free from new criminal prosecutions that would violate the Fifth and Sixth Amendments. Johnson, 529 U.S.

With that framework in mind, we turn to the statutory provision at issue here. By requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected. For example, when Haymond was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years. See 18 U.S.C. § 2252(b)(2). After the judge found, by a preponderance of the evidence, however, that Haymond had violated a particular condition of his supervised release, the mandatory provision in § 3583(k) required that Haymond be sentenced to a term of reincarceration of at least five years, up to a maximum term of life. This unques-

---

at 700 (noting the concern that imposing a subsequent term of imprisonment for a violation of the condition of supervised release would violate the defendant's right to a trial by jury, which is guaranteed by the Sixth Amendment, and right to be free from double jeopardy, which is guaranteed by the Fifth Amendment); Collins, 859 F.3d at 1216-17 (quoting Johnson and holding that the Fifth and Sixth Amendment rights of defendants on supervised release require us to interpret § 3583(e)(3) as setting penalties based on the original crime of conviction, not on the conduct which constituted the violation of the conditions of supervised release).

Booker itself relied on the Sixth Amendment in holding that a judge, during sentencing, must retain discretion. Booker, 543 U.S. at 244. "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." Id. at 237. Put another way, any proceeding that increases the authorized range of punishment to which a defendant may be subjected is, in substance, a criminal prosecution to which the protections of the Sixth Amendment apply in full. See id. at 231 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (quoting Ring v. Arizona, 536 U.S. 584, 602 (2002)).

tionably increased the mandatory minimum[2] sentence of incarceration to which he was exposed from no years to five years, yet the jury did not make the factual finding required to change his statutorily prescribed sentencing range. Instead, that finding was made by a judge by only a preponderance of the evidence. This violates the Sixth Amendment. Booker, 543 U.S. at 244.

Second, 18 U.S.C. § 3583(k) is unconstitutional because it circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct. In Johnson v. United States, 529 U.S. 694 (2000), the Supreme Court made clear that, in order to avoid serious constitutional concerns, revocation of supervised release must be viewed as punishment for the original crime of conviction, not as punishment for the violation of the conditions of supervised release. Johnson, 529 U.S. at 699-700; id. at 700 (noting "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release."); id. at 701 ("[P]ostrevocation penalties relate to the original offense."); Cordova, 461 F.3d at 1186 ("It is well-settled that supervised release is 'part of the penalty for the initial offense.'" (quoting Johnson, 529 U.S. at 700)). Specifically, these concerns include the fact that "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evi-

---

[2] It is enough for our purposes that the mandatory minimum is increased. Thus, we need not address whether this provision also increased the statutory maximum sentence to which Haymond was exposed.

dence standard, not by a jury beyond a reasonable doubt." Johnson, 529 U.S. at 700 (citing 18 U.S.C. § 3583(e)(3)). Further, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." Id. "Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties." Id. (collecting cases). "We therefore attribute postrevocation penalties to the original conviction." Id.

Contrary to this requirement, § 3583(k) impermissibly requires a term of imprisonment based not on the original crime for which the defendant was properly convicted, but instead on the commission of a new offense—namely "any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed." 18 U.S.C. § 3583(k). By its plain text, § 3583(k) states that, if a qualifying defendant commits one of these enumerated crimes, "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment . . . not less than 5 years." Id.

If Haymond were to violate the terms of his supervised release by committing any crime not enumerated in § 3583(k) or by committing a technical violation, he would be subject to revocation under § 3583(e)(3). If sentenced under § 3583(e)(3), he would face a term of reimprisonment properly limited by his original crime of conviction, with an absolute *maximum* term of two years. The district court could have sentenced Hay-

mond to life imprisonment *only* if it found that Haymond had violated the conditions of his supervised release by committing one of the subsequent crimes enumerated in § 3583(k), in which case it would have no choice but to impose a *mandatory minimum* term of five years up to life. The available punishment is tied directly to the nature of the new conduct that serves as the basis for the revocation.

Regardless of the nature or severity of the defendant's original crime of conviction, § 3583(k) imposes a mandatory minimum five-year term of imprisonment for only those specific offenses enumerated, while all other violations are subject to the maximum terms set in § 3583(e)(3). By separating these crimes from other violations, § 3583(k) imposes a heightened penalty that must be viewed, at least in part, as punishment for the subsequent conduct—conduct for which the defendant has not been tried by a jury or found guilty beyond a reasonable doubt. This, the Court has said, is not permitted. See Johnson, 529 U.S. at 699-701.

To be sure, the sentencing judge can and, according to the Sentencing Guidelines, should consider the severity of the conduct by which a defendant violated the conditions of his or her supervised release. A more serious violation might well recommend a longer term of reimprisonment. But, if we wish to maintain the premise that revocation of supervised release is a punishment for the original crime of conviction, Congress must set the authorized term of reimprisonment based on the severity of that original crime. In fact, our recent opinion in United States v. Collins, 859 F.3d 1207 (10th Cir. 2017), is dispositive on this point. In Collins, we cited Johnson and held that 18 U.S.C.

§ 3583(e)(3) sets the maximum terms of reimprisonment following revocation of supervised release based on the severity of the *original crime of conviction*, not based on the conduct that constituted the violation, because setting the punishment based on the new conduct would violate the Fifth and Sixth Amendments. Collins, 859 F.3d at 1217 ("[C]onstru[ing] the 'offense that resulted in' language of § 3583(e)(3) as referring to the violative conduct resulting in revocation . . . places us squarely at odds with the Fifth and Sixth Amendments. Our interpretation of § 3583(e)(3)—that the 'offense that resulted in' language is meant to refer to the offense for which the defendant was first sentenced to supervised release—avoids these same constitutional difficulties."). But that violation of the Fifth and Sixth Amendments—setting new punishment that is more severe than would otherwise be allowed by statute because of the severity of new conduct—is exactly what § 3583(k) purports to do.

As written, § 3583(k) expressly increases the available penalty for *only* these particular violations, so it is not based on the original crime of conviction, but on the nature of the subsequent violative conduct. This construction, like the mandatory language discussed above, effectively transforms the revocation proceeding into a criminal prosecution, imposing punishment for new conduct. "It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" See Booker, 543 U.S. at 230 (quoting In re Winship, 397 U.S. 358, 364 (1970)). "It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a

jury find him guilty of all the elements of the crime with which he is charged.'" Id. (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)). Thus, § 3583(k) violates the Sixth Amendment because it punishes the defendant with reincarceration for conduct of which he or she has not been found guilty by a jury beyond a reasonable doubt, and it raises the possibility that a defendant would be charged and punished twice for the same conduct, in violation of the Fifth Amendment.[3] See Johnson, 529 U.S. at 700.

---

[3] Haymond also argues that his sentence violates the statutory maximum. Aplt. Br. at 27. Most interestingly, he means not the statutory maximum authorized under the supervised release statute for his original crime of conviction, but the statutory maximum set by statute for his alleged new offense, possession of child pornography. See id. 46-47. The fact that Haymond attempts to invoke the statutory maximum allowable for his alleged new crime highlights the fact that the term of incarceration imposed under § 3583(k) is most obviously viewed as a punishment, not for the original crime, but for the defendant's new conduct. As discussed, such an approach to revocation of supervised release is not permissible. Johnson, 529 U.S. at 700.

Haymond's argument on this point is otherwise unavailing. The statutory maximum sentence allowed for a particular subsequent crime has no bearing on the length of the term of reimprisonment allowed for a violation of supervised release. This is because, as discussed, "postrevocation penalties relate to the original offense," not the new conduct. Johnson, 529 U.S. at 701. And the violative conduct need not be criminal at all. Id. at 700. Conduct which is not criminal carries no permissible term of imprisonment, yet, if that conduct violates the conditions of a defendant's supervised release, it may be the basis for a term of reimprisonment following revocation of supervised release. See id.; 18 U.S.C. § 3583(e)(3). Thus, the statutory maximum sentence to which Haymond might be subjected if he were convicted of possessing child pornography is completely irrelevant to the term of reimprison-

IV

As for the appropriate remedy, "we must 'refrain from invalidating more of the statute than is necessary.'" Booker, 543 U.S. at 258 (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)). "[W]e must retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." Id. at 258-59 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Regan, 468 U.S. at 653. "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Alaska Airlines, Inc., 480 U.S. at 685.

The first sentence of § 3583(k) provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life.

Id. This sentence merely sets forth the applicable term of supervised release available based on the original crime of conviction, so it creates none of the concerns raised in this appeal regarding the imposition of

---

ment that may be imposed upon him for a violation of the conditions of his supervised release.

a mandatory minimum sentence as a result of certain subsequent conduct. The next two sentences, however, provide:

> If a defendant required to register under the Sex Offender Registration and Notification Act *commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed*, the court *shall* revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. *Such term shall be not less than 5 years.*

18 U.S.C. § 3583(k) (emphasis added). The italicized language violates the Constitution by increasing the term of imprisonment authorized by statute based on facts found by a judge, not by a jury beyond a reasonable doubt, and by tying the available punishment to subsequent conduct, rather than the original crime of conviction. Thus, we must decide whether the statute can function independently without these two sentences.

We conclude that the remaining provisions of § 3583, and of the sentencing code, 18 U.S.C. §§ 3551-3586, can function independently, without the isolated provision of § 3583(k) that provides for a mandatory sentence of five years' reimprisonment to be imposed when supervised release is revoked based on commission of a specific set of subsequent crimes. Aside from three references to § 3583 generally, no other provision of the sentencing code refers to § 3583(k). Without this unconstitutional provision, all violations of the conditions of supervised release would be governed by § 3583(e)(3),

which appropriately ties the available punishments for revocation of supervised release to the original crime of conviction. Thus, the invalidation of this isolated unconstitutional provision would have no significant effect upon the sentencing code as a whole. In fact, Congress did originally enact this legislation without the challenged provision, which was only added in 2006.[4] Thus, we cannot conclude that Congress would have been unwilling to enact the legislation without this unconstitutional provision. The last two sentences of § 3583(k) are unconstitutional and unenforceable.

V

For the foregoing reasons, we AFFIRM the revocation of Haymond's supervised release, we VACATE his sentence following that revocation, and we REMAND for resentencing under § 3583(e)(3) without consideration of § 3583(k)'s mandatory minimum sentence provision or its increased penalties for certain subsequent conduct.

---

[4] Congress added subsection (k) to § 3583 in 2003 and extended the authorized term of supervised release for sex offenders to "any term of years or life." See PROTECT Act of 2003, Pub. L. No. 108-21, § 101, 117 Stat. 650, 651-52 (2003). A 2006 amendment added the minimum five year term of imprisonment following revocation for certain subsequent crimes and provided that the ordinary term limits in subsection (e)(3) did not apply. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 587, 603 (2006).

No. 16-5156, United States v. Andre Ralph Haymond

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur that the government met its burden of showing by a preponderance of the evidence that Mr. Haymond knowingly possessed child pornography. I disagree with the court that some of the district court's factual findings supporting this conclusion are clearly erroneous. I also dissent from the court's holding that 18 U.S.C. § 3583(k) is unconstitutional.

Our review of factual findings is "significantly deferential." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 623 (1993).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

When looking at the record as a whole, the district court's view of the evidence was permissible. For instance, this court holds that it is clearly erroneous that "on the phone" means "saved, downloaded, or otherwise accessible on the phone in some application for viewing at the user's discretion." Ct. Op. at 7 (brackets, emphasis, and citation omitted). But the district court's interpretation is supported by Mr. Penrod's

testimony that the Gallery3D application searches the phone for existing images—and that, unlike with images stored in the browser cache, there was no alternative explanation (i.e., other than that the images were already on the phone) for how the images were stored in the cache. 2 R. 167-68. Mr. Penrod's later clarification of the different ways the images could have been saved or downloaded to the phone—via text message, social media, email, etc.—does not make the statement any less true, or any less supported by the evidence.

Likewise, the court holds that it is clearly erroneous that "Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession" and that "the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images." Ct. Op. at 7 (brackets, emphasis, and citation omitted). These district court findings are ostensibly error based on Mr. Penrod's clarification that, because there was no metadata associated with the images, one could not say with certainty how the images came to be on the phone. Id. at 7-8; see 1 R. 186. But these findings are not clearly erroneous merely because the technological path could not clarify with 100% accuracy how the images got on the phone. The district court reasonably concluded that the most likely explanation was that Mr. Haymond did something to allow them to be there. Indeed, the factual findings that this court agrees were proper seem to support this conclusion: Mr. Haymond had exclusive use of his phone, the images were on the phone, the images were accessible to Mr. Haymond, and the images were similar to those he was previously convicted of illegally possessing. Viewed in light of the surround-

ing evidence, simply because there are two views of Mr. Penrod's testimony does not mean that the district court clearly erred in choosing one over the other.

As for the constitutionality of 18 U.S.C. § 3583(k), I disagree with the court's conclusion that United States v. Booker, 543 U.S. 220 (2005), applies to revocation proceedings. Ct. Op. at 15-16. Mr. Haymond was tried and found guilty beyond a reasonable doubt of the original offense, and those jury-found facts supported the sentence imposed. Booker applied to that sentence. Mr. Haymond also was instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked.

As the Supreme Court has explained, revocation of supervised release "need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." Johnson v. United States, 529 U.S. 694, 700 (2000). That the full panoply of rights were guaranteed to Mr. Haymond during his initial criminal proceeding does not mean that they attach once more during a revocation proceeding. That proceeding is, after all, "not a stage of a criminal prosecution." Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

Up to this point, the court and I agree. We disagree that § 3583(k) becomes unconstitutional because it "increases the mandatory minimum penalty to which a defendant may be subjected, and does so based on facts not found by the jury." Ct. Op. at 14. Were the court correct, the problem it identifies seems like it would be true of all revocation proceedings: if a defendant is sentenced to any term of supervised release,

the fact that the release can then be revoked and the defendant be sent back to prison for an *additional* term means that "the penalty to which a defendant *may be subjected*" has been increased based on facts not found by a jury. Id. (emphasis added).

In other words, unless either (a) all revocation proceedings must empanel juries for fact-finding (which the Supreme Court, with good reason, has told us is not the case) or (b) the revocation proceeding is treated as a new criminal prosecution (which the Supreme Court also has told us is not the case), it is hard to understand why under current precedent Booker would apply but Apprendi and Alleyne would not. While postrevocation penalties might be considered attributable to the original conviction, the revocation proceeding is neither part of that criminal prosecution nor is it a new criminal prosecution. See Johnson, 529 U.S. at 700.

The Supreme Court has also answered the court's second objection to § 3583(k)—that it "circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific conduct." Ct. Op. at 20. The court cites Johnson for the proposition that revocation of supervised release is not "punishment for the violation of the conditions of supervised release," id. (citing 529 U.S. at 699-700), but then fails to take the Supreme Court at its word. This is apparently because Congress has delineated different terms of revocation for different breaches of supervised release. Id. at 21 (comparing § 3583(k), which ties its requirement of at least five years' revocation to the commission of enumerated sex offenses, with § 3583(e)(3), which sets limits on the resulting terms of reimprisonment based on the "offense that resulted" in

the underlying supervised release). The court takes issue with the fact that had Mr. Haymond violated the conditions of his supervised release in a manner other than by committing one of the crimes referenced in § 3583(k), then he would have been subject to revocation under § 3583(e)(3) and faced a shorter term of reimprisonment. Ct. Op. at 21. Therefore, the court concludes, subsection (k) is actually punishment for the new crime.

But the distinction cannot be (and I do not take the court to contend) that revocation based on the commission of a new crime is punishment for the new crime, because § 3583(d) explicitly requires the sentencing court to include "as an explicit condition of supervised release, that the defendant not commit another . . . crime during the term of supervision." If a defendant on supervised release did so, then his release could be revoked under § 3583(e)(3). The court rightly does not contend that this would be a new "punishment."

Instead, the distinction, apparently, is that the terms of revocation differ based on what kind of new crime the defendant committed. But I see no reason why Congress cannot make that distinction. As the Sentencing Guidelines explain, under the "breach of trust" theory applicable to the revocation of supervised release, "the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust." U.S. Sentencing Guidelines Manual § 7A3(b) (2016). In my view, Congress can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation. Doing so does not thereby make the revocation proceeding a new criminal prose-

cution, nor would it be inconsistent with our holding in United States v. Collins, 859 F.3d 1207, 1210 (10th Cir. 2017), to conclude that the language in § 3583(e)(3)—"the offense that resulted in the term of supervised release"—refers to the original crime. Cf. Ct. Op. at 22.

Ultimately, we should not jump ahead of the Supreme Court when it has already spoken on this issue. Any tension between the supervised release scheme approved in Johnson and the rationale of the Apprendi/Booker line of cases is for the Supreme Court itself to resolve. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). Therefore, I would affirm the revocation of supervised release and the resulting sentence.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 08-CR-201-TCK

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDRE RALPH HAYMOND, DEFENDANT

OPINION AND ORDER

Filed: Aug. 2, 2016

Before the Court is the Order on Supervised Release (Doc. 183) ("OSR"), which alleges five violations of Defendant Andre Ralph Haymond's ("Haymond") conditions of supervised release: (I) violation of Mandatory Condition not to commit another federal, state or local crime—namely, possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) ("Violation I"); (II) violation of Special Computer Restriction Condition (2) requiring Haymond to disclose to the probation office all internet connection devices he possesses ("Violation II"); (III) violation of Special Condition 3(4) prohibiting Haymond from viewing or possessing any images depicting sexually explicit conduct or child pornography ("Violation III"); (IV) violation of Special Condition 3(2) authorizing the probation office to monitor all computer activity and to install remote monitoring software on all internet connections at Hay-

mond's expense ("Violation IV"); and (V) violation of Special Condition 1(1) requiring Haymond to attend sex offender treatment ("Violation V").[1]

On June 21, 2016, the Court conducted an evidentiary hearing on the OSR, during which Haymond contested the factual basis for all five violations. Haymond was represented by William Lunn ("Lunn"), the same lawyer who represented him during his original trial and appeal. The United States presented two United States Probation Officers for the Northern District of Oklahoma as witnesses—Sharla Belluomo ("Belluomo") and Kory McClintock ("McClintock"). Lunn presented three witnesses—forensic expert David Penrod ("Penrod"),[2] Haymond's roommate Myra Entizne ("Myra"), and Haymond.

It is unusual for this Court to write an Opinion and Order following a revocation proceeding. However, Violation I presents complex issues and carries a mandatory minimum five-year sentence due to application of 18 U.S.C. § 3583(k). Therefore, although Violation I is being prosecuted in the form of a revocation, it has serious ramifications for Haymond, and the Court issues the following explanation of its revocation decision.

---

[1] In the OSR, there appear to be four violations due to misnumbering, but there are actually five alleged violations.

[2] Penrod was also involved in Haymond's original trial and appeal. The Court granted funds for Penrod to travel to Tulsa and conduct his forensic examination. Penrod testified via video conference during the hearing.

I. Factual Findings

A. Background

In 2007, when Haymond was 18 years of age, an undercover FBI agent caught Haymond sharing child pornography files on Limewire, a peer-to-peer sharing network. The FBI located Haymond's computer, obtained a search warrant for his grandmother's house where he resided, and seized his computer. Using a specialized software program known as Forensic Toolkit, the FBI located seventy files containing child pornography, from which they selected seven images to prosecute. These images were all of minor boys engaged in sexual activity and were part of a "Brad and Bry" series of photos known to have originated in Florida. These seven images had been deleted from Haymond's computer, lacked metadata, and were found only in the computer's "unallocated space." After his arrest, Haymond admitted during interrogation that: (1) he was addicted to child pornography; (2) he had been accessing child pornography since 2006 using peer-to-peer file sharing programs such as Limewire; (3) he searched the Internet regularly for child pornography; (4) he deleted the images after he viewed them by reformatting his hard drive and reinstalling his Windows operating system; and (5) he was studying computer programming and video game and web design at a community college. Based on this evidence, a jury convicted Haymond of possession and attempted possession of seven images found in the unallocated space. The Court sentenced Haymond to 38 months imprisonment and 10 years supervised release, and imposed numerous conditions of release including computer monitoring.

After release from prison, Haymond commenced his term of supervised release on April 24, 2013. On April 8, 2014, Haymond was indicted in a separate case for Failure to Register as a Sex Offender. In June of 2014, he entered into an 18-month deferred prosecution agreement on that charge. While on supervised release, Haymond maintained employment. He passed several polygraph examinations inquiring whether he viewed or accessed child pornography, including one as recent as one month prior to the search and seizure leading to the current revocation. Haymond sometimes attended sex offender treatment but missed his treatment appointments on numerous occasions.

Haymond's main problems while on supervised release related to compliance with his computer monitoring conditions. Beginning January 5, 2015, Belluomo began supervising Haymond. Belluomo testified that, from January to October of 2015, Haymond uninstalled monitoring software from his personal computer, did not stay current on his monitoring software payments, and failed to keep installation appointments with the software company. After Haymond repeatedly failed to comply with Belluomo's directives regarding the monitoring software, Belluomo grew concerned because she could not monitor Haymond's activity on his personal computer. She gave him a strict deadline for compliance with these directives, which he did not meet. On one occasion, Haymond bragged to Belluomo that he could outsmart the monitoring software.

Based on these and other concerns, Belluomo organized a search team. On October 22, 2015, at 6:00 a.m., probation officers conducted a search of Haymond's apartment. In order to prevent deletion of

illegal activity, the officers did not warn Haymond they were coming. During the search, officers seized (1) a password-protected Samsung cellular android phone belonging to Haymond ("phone"), (2) a personal computer belonging to Haymond, (3) a personal computer belonging to Haymond's roommate Myra, and (4) two other computers found in the kitchen area. Haymond had informed Belluomo of the phone and two personal computers used by himself and Myra but had not informed her of the two computers found in the kitchen area. The computers found in the kitchen were not being monitored. Although Haymond denied that these two computers were operational, he did not deny ownership of them. The phone was also not being monitored, but that had not been required by the probation office.

B. Search of Phone

1. Web History for October 21, 2015

McClintock conducted a forensic search of Haymond's phone using a Cellebrite device. Cellebrite is a mobile forensic company that provides software and devices to perform forensic examinations of mobile phones and tablets. The Cellebrite device extracts the flash memory of the phone for examination.

McClintock was only able to locate Haymond's "web history" for the day immediately preceding the surprise search, October 21, 2015. Haymond's web history for just one day indicates that he frequently uses his phone's computer to access the internet. The Court finds that Haymond daily (or at least regularly) deleted his web history but, due to the surprise search, did not have a chance to do so for October 21, 2015.

The United States did not ask Haymond if, when, how, or why he cleared the web history from his phone. However, the Court takes judicial notice that clearing one's web history from a cellular phone is not a difficult task and can be a sound security practice. Therefore, while it may be relevant to avoiding detection of criminal activity, this type of deletion does not carry the same significance as wiping one's hard drive with special software and reinstalling an operating system.

On October 21, 2015, Haymond did not enter any searches for child pornography. He did enter a search for "open relationships," which the Court does not find to be a search for illicit images. Nonetheless, excluding all entries labeled "cookies" and including only those entries labeled "web history," Defendant's Exhibit 10 reveals the following relevant web history beginning at 10:09:26 PM (UTC) and ending at 10:33:39 PM (UTC):

> Love TGP[3]
> Young Lesbians Portal [followed by: alexa004.jpg, alexa010.jpg]
> Nasty Angels—Most Charming Young Girls [followed by p02.jpg; p07.jpg; p08.jpg]
> Naked Teen Porn @ My Sexy Teens
> My Sexy Teens—Teen Pics
> 18Magazine.com—18 Magazine—Hot Teen Models Amateur & Pro
> Porn Girls Sex—Naked Girls Models, Sex Russian Style [followed by 77087.jpg]

---

[3] The Court finds, based on other descriptions in the web history, that TGP likely stands for teen girl porn or teen girl pussy.

Naked Teens Live—Teen Nude Girl, Pictures Nude Teens [followed by 29220.jpg; 29231.jpg]
Teen Girls Pussy
Teen Big Cock Pics
Pure 18 Mobile Porn—Hot Verified 18 Years Old Teens
Best 18 Teens—Teens Porn & Young Sex
Teens Kitten—Teens Porn & Young Sex
Hot Girls 4 All—free xxx galleries of sexy girls, teens
Nubile Girls Images
Nubile Girls Gallery, Picture 1 of 15
Teen Girls Porn Pics
LittleLiana.com [followed by LittleLiana.com Image#1]
Nude Teen Pussy Young, Porn Pics
LittleLiana.com Image #3
LittleLiana.com Image #9
LittleLiana.com Image #12
Naked Pictures, Teens Nude Porn, Hardcore Young Sex
Free Photo Porn Gallery erotic-ladies
Young Pussy Photos and Hot Girls Porn—Fresh Teen Pics
TeensLoveHuge Cocks presents Willow Hayes in Pussy Willow
Real Girls - Tons of high quilty teenie's galleries
Petite 18-19 year old teenies
LittleLiana.com
LittleLiana.com Image #2
LittleLiana.com Image #4
LittleLiana.com Image #5
teenExtrem.com

2. Images Found in Phone's "Cache"

McClintock also located thousands of images in the cache of Haymond's phone. Of these images, McClintock testified that many of them depicted sexually

explicit conduct in the form of adult pornography. She did not give a precise number, and there are no images of adult pornography in the record. McClintock also identified 59 images that depicted minors engaged in sexually explicit conduct. McClintock consulted with a member of the FBI's Internet Crime Task Force, who viewed the images and confirmed that these 59 images contained minors. These 59 images are depicted and listed in Court's Exhibit 1. In addition to the picture, this exhibit sets forth a "name" and a "path" for each image.

The 59 images in Court's Exhibit 1 can be divided into three categories based upon their path. Images 1-43 ("Browser Images") are all pornographic images portraying either young girls engaged in various sexual acts with men or boys or close-ups of young girls' genitalia. The Browser Images contain the following path: "/root/**data**/com.sec.android.app.**sbrowser**/cache/Cache/[number]_0_**embedded**_1.jpg." Based on the evidence presented, this path indicates these particular images originated in the phone's internet browser, were not saved or downloaded to the phone, and were automatically saved to the cache.

Images 44-56 ("Gallery Images") are pornographic images containing young boys engaged in various sexual acts with men or boys. Images 45-47 contain a particular boy, and images 48, 54, and 56 contain a different particular boy. The Gallery Images contain the following path: /Root/**media**/0/Android/data.com.sec.android.**gallery3d**/cache/imgcacheMini.0/imgcachMini.0_**embedded**_[number].jpg. The evidence is less clear as to what this path indicates, and this issue is discussed in detail below.

Images 57-59 ("APK Images") contain young girls engaged in sexual acts. The APK images contain the following path: /Root/**media**/0/Download/**pornvideo**.apk/pornvideo.apk_**embedded**_1.jpg. Based on the evidence presented, these particular images originated in the phone due to the presence of malicious "ransomware" known as Porn Droid, were not intentionally saved or downloaded to the phone, but were nonetheless saved to the cache.

All 59 images share certain characteristics. First, all images resided in the cache when the phone was searched. Penrod described the cache at issue here as a "database," or a single file or folder, that is hidden from the phone's user. McClintock testified that cache refers to the folder within the device that stores the "temporary data and cached images from websites that have been visited by whoever was using the phone." (Hrg. Tr. at 54.) Regardless of the precise meaning of the "cache" at issue in this case, the evidence is undisputed that the cache was hidden from the user, it was impossible or difficult to access without special software such as Cellebrite or Forensic Toolkit, and Haymond did not use or have access to any such software.[4] Evidence also shows that a user may or may not have viewed or accessed an illegal image contained in the "internet cache" when the image was previously displayed. Penrod testified:

---

[4] In *United States v. Dobbs*, 629 F.3d 1199, 1202 (10th Cir. 2011), the expert had indicated that a "user may manipulate and control an image stored in the computer's cache" but that Mr. Dobbs had not done so and did not know the cache existed. However, that was not the evidence presented here.

> With Internet cache databases, all that information is automatically downloaded in the background without the user's knowledge. It's a function of almost all Internet browsers, including this one, the Samsung browser, to download all files and data on any web page that happens to be visited. . . . .

(Hrg. Tr. 101-102). This evidence is similar to that explained in *United States v. Dobbs*, 629 F.3d 1199, 1201-02 (10th Cir. 2011):

> As [the expert] explained it, when a person visits a website, the web browser automatically downloads the images of the web page to the computer's cache. The cache is populated with these images regardless of whether they are displayed on the computer's monitor. In other words, a user does not necessarily have to see an image for it to be captured by the computer's automatic-caching function.

Id.

Second, the images are all embedded thumbnail files, or smaller versions of a larger file. Penrod testified that, if the user clicked on a thumbnail, the full-size image would also appear in the cache. Third, the images have no metadata attached to them. This is important because metadata would perhaps allow one or more of the 59 images to be linked by date or time to a particular website visited on October 21, 2015. Without metadata, all the Court knows about the images is that they arrived in the cache file of the phone at some point prior to seizure.

Finally, the images could not be linked to any of the sexually explicit websites Haymond visited on October 21, 2015. Penrod testified that he examined all web-

sites, that they did not contain any of the 59 images, and they contained banners and assurances that all models were 18 years or older. The United States did not present any contrary evidence or otherwise provide any link between the 59 images in the cache and the sexually explicit websites in Haymond's web history.

II. Burden of Proof

"The burden of proof during a revocation hearing is by a preponderance of the evidence, not beyond a reasonable doubt." *Johnson v. United States*, 529 U.S. 694, 700 (2000). The Court, as the finder of fact, must be only "reasonably satisf[ied] . . . that the defendant has violated the conditions of his supervised release." *Yates v. United States*, 308 F.2d 737, 739 (10th Cir. 1962).

III. Violations II-V

The Court finds Belluomo's testimony regarding Violations II, IV, and V to be credible. Specifically, the Court finds by a preponderance of the evidence that Haymond failed to disclose the existence of two computers located in his residence (Violation II); Haymond repeatedly failed to comply with directives regarding monitoring software (Violation IV); and Haymond failed to attend numerous sex offender treatment appointments despite attempts to accommodate his schedule (Violation V). To the extent Haymond denied or offered explanations for this conduct, the Court credits Bellumo's testimony.

With respect to Violation III, Haymond's web history for October 21, 2015 proves by a preponderance of the evidence that Haymond *viewed* images depicting *sexually explicit conduct* on this date. Although Hay-

mond did not search for sexually explicit material, there are other ways to access websites, including typing in a website address, accessing a website from favorites, or connecting to other websites through links. Haymond argues that these sites could all simply be "redirected links" that Haymond never accessed or viewed. Haymond also argues that because "cookies" and "web history" appear in rapid succession, the "web history" could somehow be the result of "cookies." The Court rejects these arguments as implausible. The quantity and type of web history identified above indicates that Haymond intentionally viewed sexually explicit conduct on this date. Particularly convincing to the Court are the web history entries that involve a web title or banner followed by specific images, such as Nasty Angels—Most Charming Young Girls, immediately followed by p02.jpg; p07.jpg; p08.jpg. The website names or titles indicate they are sexually explicit, and the jpg files indicate images were viewed. The Court is reasonably satisfied that Haymond viewed sexually explicit conduct on October 21, 2015 based on the web history.

In addition, as explained below, the Court concludes Haymond committed Violation I by knowingly possessing 13 images of child pornography, which is an additional factual basis for Violation III.

IV. Violation I

A. Due Process Concerns

The Court *sua sponte* makes a record on certain due process issues related to Violation I. The protections of the Due Process Clause apply to supervised release revocation hearings. *United States v. Medley*, 362 F. App'x 913, 916-17 (10th Cir. 2010). However, a defendant in a revocation proceeding is not entitled to the full panoply of rights due a criminal defendant during trial. *Id.* Federal Rule of Criminal Procedure 32.1(b)(2) outlines the limited rights afforded to a defendant during a revocation proceeding:

> (2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:
>
> (A) written notice of the alleged violation;
>
> (B) disclosure of the evidence against the person;
>
> (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
>
> (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
>
> (E) an opportunity to make a statement and present any information in mitigation.

See also Medley, 362 F. App'x at 917 (citing *Morrisey v. Brewer*, 408 U.S. 471, 488 (1972)). Notably, a de-

fendant is not entitled to a jury trial or the "beyond a reasonable doubt" standard.

1. Timing of Hearing

There was a considerable delay between Haymond's preliminary hearing and the revocation hearing. This delay was the result of Haymond's request for funds to hire Penrod, Penrod's review of the phone, and other steps aimed at ensuring Haymond's due process rights. Thus, Haymond waived, either actually or constructively, his right to a hearing within a reasonable time.

2. Written Notice

The OSR alleges the following:

> Haymond *possessed* numerous images of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).

(Doc. 183 at 2 (emphasis added).) During the hearing and closing arguments, counsel for the United States referenced two crimes other than possession: (1) attempted possession, which is a separate crime set forth in 18 U.S.C. § 2252(b)(2); and (2) "accessing with intent to view," which is an alternative crime in 18 U.S.C. § 2252(a)(4)(B).

With respect to written notice, the Tenth Circuit has stated:

> Some circuits have required a high degree of specificity in a violations report or other form of notice about exactly which state or federal statutes have been violated, *see, e.g., United States v. Chatelain*, 360 F.3d 114 (2d Cir.2004); *United States v. Kirtley*, 5 F.3d 1110, 1113 (7th Cir.1993); *United States v. Havier*, 155 F.3d 1090 (9th Cir. 1998), but no case

> from this circuit has required that level of specificity.

United States v. Mullane, 480 F. App'x 908, 911 (10th Cir. 2012). The Tenth Circuit held that the lower court did not commit plain error by requiring only notice that the defendant committed a Class A drug offense to be proven by evidence of drugs, scales, and cash, rather than requiring notice of the specific statute violated. *Id.* The court also noted that the defendant failed to ask for more detailed notice or time to prepare his defense. *Id.*

In this case, the problem is not the lack of notice; it is the specificity of the notice. The United States Probation Office provided notice of one specific statutory violation. The Court concludes it would violate due process to find Haymond committed the crime of attempted possession, which arises under a separate, unspecified provision. Although Haymond may not be entitled to the same type of charging specificity that he would be entitled to in an indictment, he is entitled to rely upon the fact that a specific crime alleged is the only crime he needs to defend.

With respect to "access with intent to view," this is a closer question because it is a second type of crime alleged in the same statutory provision. Again, however, the due process problem lies in the specificity. The OSR does not merely cite § 2252(a)(4)(B); it uses the word "possession." Possessing an image and accessing with intent to view an image are two distinct types of conduct, with different case law governing each. Because this case dealt with highly technical, forensic evidence, this is not simply a semantic difference. Haymond's lawyer and forensic expert pre-

pared a defense to possessing child pornography. Accordingly, the Court also finds insufficient written notice that Haymond needed to defend against "accessing with intent to view." Again, the OSR need not contain dates, times, or other information, and it can be fairly vague and fairly broad. But in this case, the Court finds it would violate Haymond's due process rights to revoke based on anything other than possession, given the important distinctions between possession and the two other crimes now being discussed by the United States. Therefore, the Court limits its analysis to knowing possession.

3. 18 U.S.C. § 3853(k)

Based on the nature of Haymond's prior conviction, a finding that Haymond committed Violation I results in a minimum 5-year term of imprisonment and a 5-year to life term of supervised release. 18 U.S.C. § 3583(k). Ordinarily, revocation based on a Class A felony carries a *maximum* five-year term, still affording the revoking court discretion at sentencing. This Court is troubled by Congress's decision to permit prosecutors to elect a revocation proceeding over a criminal trial, while at the same time secure a minimum 5-year sentence and possibility of a life term on supervised release. This places the Court in a position to conduct what is in essence a criminal trial without a jury, "revoke" based merely on a preponderance of the evidence, and then be bound to a mandatory *minimum* sentence at the *maximum* sentencing range for even the most serious Class A felonies in other revocation proceedings. However, Congress passed § 3583(k), which disincentivizes prosecutors from bringing separate criminal charges (and the greater due process protections they entail) in situ-

ations such as Haymond's. *See generally* Brett M. Shockley, *Protecting Due Process from the Protect Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 Wash. & Lee L. Rev. 353, 387 (2010) ("A prosecutor who is merely discharging her duties should almost always opt for the revocation route, because substantially less effort would be required to 'better serve the public interest' by obtaining 'the most severe penalty' available.").

Thus, although the Court has serious concerns about the process authorized by Congress, the Court must proceed to analyze each element under the preponderance of the evidence standard.

B. Analysis

In relevant part, the statute provides:

> (a) Any person who—
>
> > (B) **knowingly possesses . . . other matter which contain any visual depiction that . . . has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce**, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
> >
> > (I) the producing of such visual depiction involves **the use of a minor** engaging in sexually explicit conduct; and
> >
> > (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(4)(B).

1. Use of a Minor

The Court finds by a preponderance of the evidence that production of all 59 images depict minors engaging in sexually explicit conduct. This finding is based on the Court's own review of the images, McClintock's testimony regarding the images, and Haymond's failure to offer any contrary evidence or opinions. The 59 images selected by the United States Probation Office to form the basis for Violation I are not "close calls" as to the age of the child used in the depiction.

2. Knowing Possession

"[P]ossession of child pornography is an image-specific crime," meaning the United States must prove Haymond knowingly possessed at least one of the 59 particular images at issue in this case. *United States v. Haymond*, 672 F.3d 948, 954 (10th Cir. 2012). "Possession" is defined in the Tenth Circuit as holding or having something as one's own or in one's control. *Id.* at 955. At a minimum, possession requires that Haymond have the ability to "access and control" the images. *Id.* Possession can be actual—*i.e.*, knowingly having direct physical control over the image at a given time—or constructive—*i.e.*, knowingly having the power to exercise dominion or control over the image either directly or through another person. *Id.*

The Tenth Circuit has explained the "knowingly" requirement applicable to both possession and receipt of child pornography as follows:

> [F]or possession of child pornography to be knowing, a defendant must know the charged images exist. As we have explained in the analogous context

> of knowing receipt of child pornography, defendants cannot be convicted for having the ability to control something that they do not even know exists. [*United States v.*] *Dobbs*, 629 F.3d [1199, 1207 (10th Cir. 2011]. In other words, the defendant's control or ability to control need[s] to relate to images that the defendant knew existed; otherwise, the defendant's conduct with respect to the images could not be deemed to be knowing. *Id.* To convict Mr. Haymond, the government was required to prove he knew of and also controlled (or at least had the ability to access and control) the *particular* images that formed the basis of the conviction.

Id. (emphasis added).

In discussing the knowledge requirement as applied to possession charges, the Tenth Circuit in *Haymond* discussed its prior decision in *Dobbs*, wherein it reversed a jury conviction for receipt of child pornography based on the defendant's lack of knowledge. *See Dobbs*, 629 F.3d at 1209.[5] The *Haymond* court explained that, in *Dobbs*, there was ample evidence that the defendant had "received" the images because they ended up in the cache file of Dobbs' computer. *Haymond*, 672 F.3d at 956. However, there was insufficient evidence to prove he received them "knowingly" because the government presented no evidence that Dobbs ever: (1) accessed the images stored in his

---

[5] *Dobbs* has a vigorous dissent, 629 F.3d at 1209-18, and the majority decision has been criticized by commentators, *see, e.g.*, *J. Elizabeth McBath, Trashing Our System of Justice? Overturning Jury Verdicts Where Evidence Is Found in the Computer's Cache*, 39 Am. J. Crim. L. 381, 382 (2012) (criticizing *Dobbs* as too strict and ignoring evidence of past possession).

computer's cache; (2) knew about his computer's automatic caching function; (3) saw the images (since a forensic expert explained that a user does not necessarily have to see an image for it to be captured by the automatic caching function); or (4) controlled the images by clicking on or enlarging them. *Id.* The *Haymond* court explained that "no reasonable jury could have found [that Dobbs] knew the charged images existed on his computer or had the ability to access and control them, *either when he visited the originating web pages* or later, *after the images had been saved to his computer's cache.*" *Id.* (emphasis added).

Applying the "knowing" definition and analysis in *Dobbs* to the facts on direct appeal in *Haymond*, the Tenth Circuit affirmed. As explained above, Haymond was originally convicted of possessing child pornography images found by FBI agents in "unallocated space" on Haymond's computer hard drive. These charged images "somehow had been deleted and lacked metadata." *Id.* at 952. Further, there "was no forensic evidence to show the origin of the images or how they had been deleted—that is, whether by the user or by the computer's automated processes with no prompting at all from the user." *Id.* at 952-53. However, Haymond had admitted during interviews that "he had been downloading child pornography [from Limewire] once or twice every month or two, and that after downloading the files, he would clean the registry, reformat his computer's hard drive, and reinstall his Windows operating system." *Id.*

The Tenth Circuit found Haymond knowingly possessed the charged images, highlighting factual distinc-

tions between Dobbs' knowledge and Haymond's knowledge:

> In this case, unlike in *Dobbs*, there was ample evidence from which a reasonable jury could infer Mr. Haymond knew the charged images were on his computer because he searched for and then downloaded them from LimeWire. Here, Mr. Haymond admitted to frequently searching for and downloading child pornography from LimeWire. Mr. Carter testified he found the LimeWire program on Mr. Haymond's computer. The government also introduced three images of child pornography that Agent Whisman found in Mr. Haymond's shared LimeWire folder, which the district court permitted the jury to consider as "proof of . . . [the] absence of mistake," Fed. R. Evid. 404(b), a ruling that is not challenged on appeal. The jury was not required to credit Mr. Haymond's assertions that he inadvertently downloaded child pornography from LimeWire while attempting to obtain music, particularly when he had admitted he was addicted to child pornography and used LimeWire to search for and download it. *It was thus permissible for the jury to infer that Mr. Haymond used LimeWire exclusively to search for and download child pornography.* Viewing the evidence in the light most favorable to the verdict, we conclude it was sufficient to permit a rational jury to find beyond a reasonable doubt that *Mr. Haymond knew the charged images were on his computer once he deliberately selected and downloaded them from LimeWire.*

Id. (emphasis added). Although Penrod had testified that the images "were thumbnails which came from

web pages and could not have come from Limewire," the FBI agent testified it "was not possible to determine whether the images were thumbnails." *Id.* at 956 n.15. Thus, a jury could infer that Haymond "used Limewire exclusively to search for and download child pornography." *Id.* at 956. This inference was critical because there was nothing linking the seven charged images with any particular Limewire search. In order for the knowledge to be "image specific," therefore, the jury had to plausibly infer that *all* child pornography in Haymond's unallocated space originated exclusively from Limewire downloads rather than an internet browser.

As to Haymond's ability to exercise control over the seven charged images, the court reasoned:

> Unlike the defendant in *Dobbs*, who sought out child pornography on internet websites, Mr. Haymond admitted to seeking out and downloading child pornography through peer-to-peer programs, including LimeWire. As the defense's own forensic specialists testified, downloading from LimeWire does not occur automatically. It requires the user to highlight the names of the file or files he wishes to download and then to press "enter." In contrast to the caching process at issue in *Dobbs*, which occurs automatically, this type of volitional downloading entails "control" sufficient to establish actual possession. Accordingly, the evidence here was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that Mr. Haymond "knowingly possessed" the charged images.

Id. at 956-57. Yet again, important information is contained in a footnote:

> Because we conclude there was sufficient evidence to establish Mr. Haymond knowingly possessed the images by downloading them, we need not decide whether he constructively or actually possessed the charged images after they were deleted and resided in his computer's unallocated space. As a result, *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011), which held the defendant could not "knowingly possess" child pornography *once it had reached his computer's unallocated space*, is inapposite. Nor do we decide whether, as the government claims, Mr. Haymond's admissions were sufficient to prove he exercised control over those particular images by deleting them.

Id. at 957 n.16 (emphasis added). This footnote indicates that the Tenth Circuit affirmed Haymond's conviction on a theory of Haymond's knowing possession in the past. Specifically, Haymond had knowingly possessed the seven images at a previous time when he downloaded them from Limewire, although they existed only in unallocated space when his computer was searched. The court did not reach two other questions: (1) whether he possessed them in the unallocated space, in light of admissions and other circumstantial evidence; and (2) whether his deletion of the charged images was sufficient to prove past possession.

Applying the hearing evidence in this case to the legal principles articulated in *Haymond* and *Dobbs* is not a straight-forward task. Commentators have struggled with questions similar to those presented here. *See generally McBath*, 39 Am. J. Crim. L. at 382, *supra* note 5; Katie Gant, *Crying over the Cache: Why*

Technology Has Compromised the Uniform Application of Child Pornography Laws, 81 Fordham L. Rev. 319, 322 (2012) (analyzing what "knowingly" means "in a technologically advanced day and age"). When encouraged to do so by the Court at the close of evidence, the United States declined to offer additional briefing setting forth the law in conjunction with the hearing evidence. Thus, the legal arguments in Haymond's brief stand largely unrebutted.[6]

a. Browser Images/APK Images

The United States failed to prove by a preponderance of the evidence that Haymond knowingly possessed the Browser Images or the APK Images. The Court finds insufficient evidence to show that Haymond, while on supervised release, either: (1) conducted searches related to these images or other child pornography; (2) accessed websites containing these images or other child pornography; (3) downloaded these images from a peer-to-peer network or the internet; (4) clicked on or enlarged these images while they were in the browser or the cache; (5) attempted to delete these images from the cache; or (6) used any "washing" software in attempt to delete these images from the cache.

With respect to the Browser Images, the United States must do more than merely show the images

---

[6] Rather than offer briefing, the United States simply argued that *Dobbs* does not apply to possession cases because it was a receipt case. Even a cursory reading of *Haymond*, however, reveals that the Tenth Circuit views *Dobbs*' "knowing receipt" analysis as highly relevant to "knowing possession."

were in the cache file of a phone possessed and controlled by Haymond. This is because, under Tenth Circuit law explained above, a user does not necessarily view, access, or control images that are automatically cached from an internet browser. In this case, in contrast to Haymond's original case, the evidence of any searching or volitional acts related to the Browser Images is wholly lacking. With respect to the APK Images, they arrived in the cache via malicious software known as Porn Droid. Penrod's testimony indicates that a user does not necessarily view, access, or control images from this type of malicious software, and there is no evidence that Haymond possessed or took any volitional acts whatsoever related to those images. Accordingly, the United States has failed to show Haymond knowingly accessed, controlled, or otherwise possessed the Browser Images or the APK Images (1) at any point in time prior to the search of his phone, or (2) at the time the phone was searched. The majority's reasoning in *Dobbs*, as explained and amplified in *Haymond*, is directly on point with respect to the Browser Images and APK Images.

b. Gallery Images

For the same reasons explained above, the United States failed to prove knowing possession of the Gallery Images based merely on their existence in the cache at the time Haymond's phone was searched. However, the Gallery Images pose a more difficult question on the issue of past possession, *i.e.*, whether Haymond knowingly possessed the Gallery Images at a point in time prior to search. The crucial technical question is whether the "3d gallery" designation in the path tends to show Haymond exercised control over the images at

a previous point in time. If the path tends to prove Haymond saved or had access to the images in an application on his phone, this is a crucial distinction from the Browser Images and APK Images.

Curiously, the United States did not highlight the different path or separately discuss the Gallery Images during its case in chief. Instead, this distinction was elicited during Penrod's testimony. The critical testimony relied upon by the Court in reaching its decision is set forth below:

[Cross-Examination by United States]

Q. So, going back to prior when you talked about the 59 images appearing from the S browser cache file, not only do we have the pornvideo app as a source of three of the images, but we have the Gallery 3D, the photo viewing app, as responsible for 13 of the images; is that correct?

A. Correct.

Q. And your rationale with respect to how the website loads and the items that are not visible at the bottom of the web page, that's not applicable to Gallery 3D because it's not a website; right?

A. Yeah, it functions in the same way. It's simply a cache of thumbnails that are created through Gallery in almost the exact same method or process.

Q. Okay. So when you were talking about being unable to potentially see items that were in the cached file, you were talking about the Samsung browser; is that right?

A. That's right.

Q. Okay. Now, you would agree with me that it doesn't take a—that 99.9 percent of users that have an Android phone and have Gallery 3D, that they can, without special software, navigate to their photo gallery?

A. Correct, yes.

Q. And within this piece of the phone that is accessible to your average user, an app that comes stock or is an easily downloadable app for Samsung users, they have the ability to look at photos through the Gallery 3D application?

A. That's correct.

Q. And—

A. Through Gallery.

Q. Through Gallery?

A. The Gallery, right.

Q. So a cached file from the Gallery indicates that, just the same way as for the Samsung browser, that at one point an image that corresponded to that cached file was present in that application?

A. Correct.

. . .

[Redirect by Lunn]

Q. Now, how is it that a person would not know about the images that are in the Android gallery if they wound up in his cache?

A. *Well, the gallery cache functions in the same way that the browser cache does: it's a cached database and it contains thumbnails. If your phone has a large number of images on it, that all those images are going to be represented, once Gallery finds them, they'll be represented in the Gallery 3D cache folder, cache database.*

Q. And Mr. Haymond's phone had a large number of images on it; is that a fair statement?

A. Yes.

Q. We're talking about tens of thousands of images; is that right?

A. Yes, that's correct.

Q. So, the fact that something is in the—coming from the Android Gallery doesn't necessarily mean that he has gone down and looked at every single one of those 10-, 20-, 30,000 images?

A. Well, a significant number of those images are images that are in cache, they're spread out through the—they're part of various programs, for example, *so those types of files would not end up in Gallery 3D. Just it's going to go out and look for actual images throughout the phone.*

Q. Now then, and so it's possible under those circumstances that somebody can actually have a —can get something in their computer cache from the Android Gallery and not know about those images?

A. *Yeah, that's absolutely true because the Gallery 3D cache database contains images from all*

over the phone, not just from one particular folder on the phone, but from all over the phone.

. . .

[Re-Cross by United States]

Q. You testified on cross-examination, and then again on redirect examination, that the way the gallery works is it searches the phone for what images may be available on the phone; correct?

A. Correct.

Q. Gallery doesn't search the Internet for what might be available in the universe of images on the Internet?

A. No.

Q. So Gallery is only going to aggregate or show you the photo depictions of items on your phone?

A. Correct.

Q. And Mr. Lunn's question to you was that it was possible to have these in your gallery and not know they were there. I believe he asked you that question. Do you recall?

A. Yes.

Q. But in this case there's not an explanation that's similar to the Samsung browser that explains how they got there; is that correct?

A. That's correct, yes.

Q. So you said before on direct examination that there is no evidence on the phone that somebody clicked on or enlarged a photo or moved a

photo between folders. But if the person were to acquire the suspected images from the Internet, its presence in the Gallery would indicate a movement of sorts, that it moved from just being something available on a web page to actually being on the phone?

A. Well, again, the rules for this cache are just like the cache in the web browsers; there's nothing here that tells you anything about these images. It's not telling you how, when, where they were other than the fact that they're inside this cache.

Q. So, Mr. Penrod, Gallery shows the images that are on the phone?

A. Correct.

Q. Not what's on the Internet, not what's potentially available, but what's actually on the phone?

A. That's correct.

Q. And what we know, without knowing where on the phone it was located, is that somehow it got onto the phone?

A. Correct.

(Hrg. Tr. 131:22-133:7; 136:25-138:6; 141:6-142:20 (emphases added).)

Based on this testimony and other circumstantial evidence, the Court concludes it is more likely than not that Haymond knowingly possessed the Gallery Images at a point in time prior to search of the phone. First, the Court finds Haymond had nearly exclusive

use and possession of his password-protected phone and rejects any argument that someone other than Haymond possessed the phone at relevant times.

Second, the Court finds that only those images actually "on the phone" (and not images merely accessed or viewed on the phone using a browser application) would have a "gallery 3d" path when found in the cache. The Court interprets "on the phone" to mean saved, downloaded, or otherwise accessible on the phone in some application for viewing at the user's discretion. The Court recognizes that Penrod's testimony is not perfectly clear on this point, particularly during recross. However, based on careful examination of his testimony as a whole, the Court finds by a preponderance of the evidence that Haymond knowingly took some volitional act related to the Gallery Images that resulted in the images being on his phone in a manner consistent with knowing possession. Although the images were no longer in an accessible area of the phone at the time of the search, the path convinces the Court that these 13 images previously resided in an accessible area of Haymond's phone and were under his control. This is distinct from the Browser Images, which, under the Tenth Circuit's reasoning in *Haymond* and *Dobbs*, were not necessarily saved, downloaded, viewed, accessed, or controlled in any manner prior to residing in the cache. This is also distinct from the APK Images, which arrived to the phone via malicious software.

Third, the path demonstrates that Haymond took prior volitional actions with regard to the Gallery Images. In *Haymond*, the Tenth Circuit reasoned that volitional downloads from Limewire provided evidence

that Haymond knowingly possessed the images prior to their arrival in the "unallocated space" of his computer. Saving, downloading, or otherwise placing the image in an application on the phone is a similar volitional act. Further, the evidentiary link between Haymond's prior volitional act(s) and the Gallery Images found in the cache is even greater than that present between Haymond's Limewire downloads and the "Brad and Bry" images found in the unallocated space. In order for there to be an image-specific link to the Brad and Bry images, the jury had to conclude all images in the unallocated space necessarily originated as Limewire downloads. Here, based on the path, there is stronger evidence that each of the 13 Gallery Images were once knowingly possessed by Haymond.

Finally, although the United States failed to highlight this key fact, the 13 Gallery Images depict sexual acts between young boys or between boys and adult males. Viewing the 59 images as a whole, these 13 images stand out as distinct from the Browser Images and the APK Images and are more consistent with images forming the basis of Haymond's original conviction. Therefore, the content of these 13 images contributes to this Court's finding of knowing possession of the Gallery Images.

3. Interstate Commerce

For the Gallery Images, the next question is whether the United States met its burden of proving, by a preponderance of the evidence, that the digital images "contain any visual depiction . . . that has been . . . transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce . . . by any means including by com-

puter[.]" 28 U.S.C. § 2252(a)(4)(B). This language, which was revised by the Effective Child Pornography Prosecution Act of 2007 ("ECPPA"), Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (2008), represents an expansion of the statutory language governing Haymond's original conviction.[7]

The ECPPA was a direct response to the Tenth Circuit's decision in *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007), which held that use of the Internet alone did not confer federal jurisdiction. *See* Jonathan R. Gray, *United States v. Schaefer and United States v. Sturm: Why the Federal Government Should Regulate All Internet Use As Interstate Commerce*, 90 Denv. U. L. Rev. 691, 709 (2012) ("In direct response to *Schaefer*, Congress expressed its intent that 'transmission of child pornography using the Internet constitutes transportation in interstate commerce.'") (quoting public law). By adding "any means or facility of interstate commerce" and "in or affecting interstate commerce," Congress "made it clear to the courts that it intended the statute to reach the full extent of Congress's Commerce Clause power" and "answered the call from the Tenth Circuit in *Schaefer* demanding more precise language." *Id.* This expanded language has withstood constitutional challenges under the Commerce Clause. *See e.g., United States v. Konn*, 634 F. App'x 818, 821 (2d Cir. 2015) (re-

---

[7] On appeal, the Tenth Circuit affirmed the interstate commerce element based on an FBI agent's testimony that the "Brad and Bry" images were originally taken in Florida and had necessarily crossed state lines at some time before reaching Haymond's computer in Oklahoma. *See Haymond*, 672 F.3d at 954. Much less evidence is required under the current statute.

jecting argument that ECPPA exceeded Congress's commerce power because "there can be no question that the Internet is a channel and instrumentality of interstate commerce; and Congress may regulate and protect the instrumentalities of interstate commerce").

Under this relaxed standard, the United States need only show that it is more likely than not that the Gallery Images arrived on Haymond's phone from use of the internet, rather than some other means such as Haymond taking the photos himself. The Court is reasonably satisfied these images, which are thumbnails, were originally saved or downloaded to Haymond's phone from the internet.

V. Conclusion

The United States failed to call its own forensic expert, failed to assist the Court in applying Tenth Circuit law on "knowing possession" to its evidence, and failed to prove Haymond knowingly possessed any of the 59 images beyond a reasonable doubt. If this were a criminal trial and the Court were the jury, the United States would have lost. This highlights the Court's concerns with § 3583(k) and the mandatory penalties it carries. Nonetheless, for reasons explained above, the Court finds it is more likely than not that Haymond knowingly possessed, accessed, controlled, and viewed the thirteen Gallery Images at some time prior to search of his phone, in violation of 18 U.S.C. § 2252(a)(4)(B).

Accordingly, the Court hereby revokes Haymond's term of supervised release based on a finding that he committed Violations I-V. The United States Probation Office is ordered to prepare a Presentence Inves-

tigation Report. Sentencing is set for Friday, September 16, 2016, at 11:00 a.m.

DATED THIS 2nd day of Aug., 2016.

/s/ TERENCE KERN
TERENCE KERN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-5156

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDRE RALPH HAYMOND, DEFENDANT-APPELLANT

ORDER

[Filed: Jan. 16, 2018]

Before: **BRISCOE**, **KELLY**, and **MCHUGH**, Circuit Judges.

Appellee's petition for rehearing is denied. Judge Kelly would grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellee's motion to file a reply to the response to the petition for panel rehearing or for rehearing en banc is denied.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

18 U.S.C. 3583 (2012 & Supp. IV 2016) provides:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the fac-

tors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for

use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

---

[1] See References in Text note below.

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION. —The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after

the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more

than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.